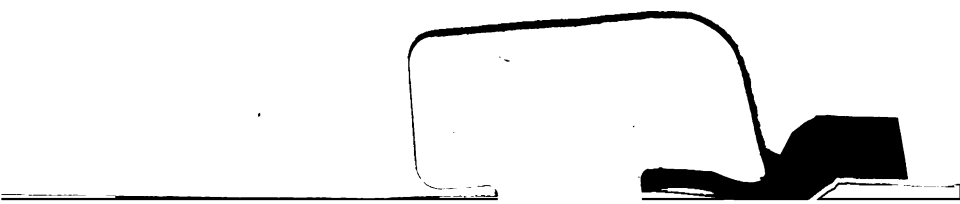

ARGUMENT

OF THE

HON. WILLIAM SMITH,

IN GIVING JUDGMENT

ON

THE CASE

OF THE

HON. MR. JUSTICE JOHNSON,

IN THE

COURT OF EXCHEQUER,

ON THE 7TH OF FEB. 1805.

N. B. BARON SMITH DISSENTED FROM THE REST OF THE COURT.

Dublin:

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1805.

TO THE

RIGHT HONOURABLE

SIR M. SMITH, BART. L. L. D.

MASTER OF THE ROLLS,

LORD COMMISSIONER OF THE GREAT SEAL,

AND ONE OF HIS MAJESTY'S

MOST HONOURABLE PRIVY COUNCIL

IN IRELAND.

THE following Note of his Son's Argument, on the Case of Mr. Justice Johnson, extracted (with the Baron's permission) from a general Report of the proceedings in the Court of Exchequer, is, with much Respect, inscribed

By his Lordship's

Obedient,

And very humble Servant,

THE EDITOR.

COURT OF EXCHEQUER, Feb. 7th, 1803.

ARGUMENT

OF THE

HON. WILLIAM SMITH.

IN this cafe the arreſt appearing to me to have been illegal, I am conſequently of opinion that the Priſoner ſhould be diſcharged.

Indeed, I conceive that ſuch ſhould be our rule, in a matter of leſs eaſy ſolution than the preſent. For it is only in caſes of certainty, that the Court is to remand. In thoſe of doubt, it is bound to bail, or to diſcharge. And here, accordingly, we ought to liberate, in as much as we cannot bail.

In entertaining the ſentiments which I have briefly thus avowed, I am aware that I encounter the authority of my Lord Chief Juſtice;* whoſe fallibility I am the more reluctant to admit, becauſe he would himſelf be the firſt to make, and nobly act on, the admiſſion. But, fallible he

* Downes.

he is; for he is human:—and it is ſuperfluous to ſtate, that in diſſenting from the opinion, I venerate the man.—He indeed is one, my deference for whoſe ſuperior intellect and knowledge gives way only to my reſpect for his more valuable qualities; and to the honeſt exultation which I feel, that merit ſo uncommon is placed at the head of our Crown law.—I muſt differ with ſome degree of qualm from him, who more elevated by worth and talent, than by age or ſtation, would bend a patient and docile ear to the arguments of the humbleſt man. Who, if theſe ſhould bring conviction to his candid and modeſt mind, would unaffectedly rejoice to have his errors thus corrected; without adverting to the lowlineſs of the inſtrument which removed them;—and whom this liberal ſentiment alone would have ſufficed to exalt, above the corrector to whom he yielded. A man, who may be proud; but is a ſtranger to that baſe pride, whoſe pert and diſguſting offspring are Obſtinacy and Preſumption.

I am aware that I alſo differ in opinion, from one with whom I have generally had the good fortune to agree; and from whom no man, who is as well acquainted with him as I am, can diſſent, without conſiderable ſcruple and heſitation. I mean my highly eſteemed and reſpected friend, *Judge Daly*.

But

But let it be recollected, that the peculiar ſituation of *Judge Oſborne* precluded him from giving, and perhaps prevented him from forming, any judgment on the preſent queſtion. It is poſſible that, had he not yielded to the circumſtances of a ſituation, which he conſidered ſo delicate as to enjoin ſilence as a duty, he might have delivered an opinion, in concurrence with that of the ſecond Judge of the Court; and in oppoſition to what a perſon, unacquainted with the manly integrity of his character, might ſuppoſe to be the more probable bias of his mind. In that event, the Court being equally divided, the Priſoner would have been remanded, not ſo much by a ſubſtantial deciſion on his claim, as by virtue of an etiquette and form of law.

There is then a poſſible caſe, in which the Court of King's Bench may be conſidered as having been divided. But, whether ſuch an hypotheſis be admitted or not, be it remembered, that my ſentiments coincide with thoſe of *Mr. Juſtice Day;* as independent a gentleman, and as intelligent and upright a magiſtrate, as, I believe, is to be found upon the bench of either country; and one eminently verſed and informed in Criminal law: a Judge, to whoſe hands an innocent man might commit his life; and whoſe late deciſion ſeems calculated to prove, that the liberties of the ſubject may be entruſted to his care.

Nor

Nor am I unapprized that, in my own Court, I am likely to be left alone: another argument (it muſt be confeſſed) to ſhew that I am wrong. But here too, I have to do with men, whoſe talents will forbid them to be arrogant or uncandid: for of Talent, I find Modeſty the almoſt inſeparable companion.

Thus have I every advantage, which the impartiality of the judicial ſtation permits me to deſire.

If I could but avail myſelf of theſe,—if the Truth and Juſtice of my opinions could ſupply the deficiency of my powers, I ſhould not deſpair of making an impreſſion on my Lord and Brethren, in behalf (as I conceive) of our liberties and conſtitution.

The Priſoner's detention muſt be juſtified, if it admit of juſtification, by the proviſions of the Act of the 44th of the preſent King, chap. 92, ſo that the queſtion is upon the conſtruction of that ſtatute.

Where the enacting clauſes are perfectly free from ambiguity or doubt, it is neither neceſſary, nor perhaps allowable, to reſort to the title, preamble, or other parts of the ſtatute, for the purpoſe of controlling the efficacy of ſuch plain enactments.

But where the enacting paſſages are *not* completely clear, but on the contrary leave room for doubt, as to what ſhould be their conſtruction,

tion; the rule is otherwiſe. For though we muſt not travel out of the enactments, for the purpoſe of rendering clear expreſſions doubtful; we may look beyond them, in order to make dark expreſſions clear. In the latter caſe, Law, as well as Reaſon, permit us to derive aſſiſtance from other parts of the ſame Act; and even expatiating farther for explanation, to illuſtrate the queſtion by the purview of other ſtatutes in pari materiâ;—by the eſſential ſpirit of our law; and fundamental principles of our conſtitution.

And here, by the way, let me proteſt againſt any argument, drawn from our ſuppoſed knowledge that the preſent Act was framed for the caſe of the preſent priſoner. My reſpect for Parliament will not allow me to admit ſuch an hypotheſis for a ſingle moment: and though I were irreverently to admit a ſuppoſition, which on the contrary, I reject;—and though I were to know, what on the contrary, I cannot believe;—that what profeſſed to be a general and public law, was in fact a private and particular Act of quaſi attainder, I ſtill ſhould expound it by the ordinary rules of conſtruction; though I were thereby to leave the meſhes of the net too wide, for entangling the prey which it was intended to ſecure.

But turning at once from a ſuppoſition, in the preſent caſe ſo unjuſtifiable, and in any caſe ſo inadmiſſible and culpably diſreſpectful, I will,

agreeably to the doctrines which I have been laying down, admit the preliminary queſtion here to be, whether the enacting words in the fourth ſection of the ſtatute now before us, convey a meaning ſo unequivocal and preciſe, as to preclude the neceſſity or right of reſorting elſewhere, for aid towards a ſound and correct interpretation.

The Priſoner here ſtands charged with a *miſdemeanor:* and ſo far from having *eſcaped* from Great Britain into Ireland, ſince the alleged commiſſion of the offence, the paſſing of the Act, the iſſuing of the warrant, or day mentioned in the preamble,* it appears by an affidavit, which does not contradict the record before us, that from a period antecedent to the earlieſt of theſe dates, he has uninterruptedly continued a reſident of Ireland. Therefore it may for argument be aſſumed, that from the hour of his birth to the preſent time, he never has quitted this country for a moment.

Do the words then of the fourth ſection of this ſtatute preciſely apply to, and unequivocally include, ſuch a caſe as I have ſtated? and warrant the Priſoner's apprehenſion and detention? If they do, he muſt be remanded; and conducted, with all the inſignia of felony, to England. We have no right to diſcuſs the policy of an unambiguous ſtatute; our buſineſs being not to

* Viz. the 1ſt of Auguſt, 1804.

to legiſlate, but to conſtrue. What the Legiſlature has done clearly, we are to intend that it has done rightly;—nor can we conſider a proceeding, which Parliament has ſanctioned, as inconſiſtent with the principles of a free government; or as an invaſion of the Conſtitution.

But I am far from conſidering the enacting words of the clauſe in queſtion, as applying clearly to the Priſoner's caſe.

The words are, that "from and after the 1ſt "day of Auguſt, 1804, if any perſon, againſt "whom a warrant ſhall be iſſued by a magiſtrate "of Great Britain, for any crime or offence, "againſt the laws of England or Scotland, ſhall "*eſcape, go into, reſide,* or *be* in Ireland, it ſhall "be lawful to"—proceed, as has been done in the caſe before us.

It is plain, that Mr. Juſtice Johnſon does not come within the deſcription of perſons who have eſcaped, or gone into Ireland. The affidavit, already adverted to, excludes him from that claſs; and if the enacting words had ended here, would manifeſtly exempt him from the operation of this ſtatute.

But the enactments do not ſtop here. They extend to certain caſes of perſons who *ſhall reſide* or *be* in Ireland. Therefore, if theſe words indiſputably embrace Judge Johnſon's caſe, there is no more to be ſaid. We may cloſe the ſtatute, without examining the remaining clauſes; and with becoming

becoming reliance on the wiſdom, and deference to the beheſts of Parliament,—muſt remand the Priſoner, without trembling for the Conſtitution.

But theſe ſupplemental words, ſo far from relating unequivocally to the caſe before us,—according to my conſtruction of them, do not apply to it at all,

At leaſt it cannot be alleged that they admit of but *one* reaſonable expoſition; or conſequently that they are wholly unambiguous:—and if their ambiguity be once conceded, ſuch admiſſion will let in, for the purpoſe of explanation, the remaining paſſages, and general context of the ſtatute; the policy of the law, according to one or other of the propoſed conſtructions; together with the aid of thoſe various topics which I have already noticed.

It cannot, I ſay, be contended, that the words "ſhall reſide or be" can *only* mean, ſhall from his birth *have* conſtantly reſided, or from the hour of his nativity ſhall uninterruptedly *have* been. It muſt, on the contrary, be allowed that ſuch words *may* denote a reſidence, which though not of future commencement, (with reference to the iſſue of the warrant,) yet originated in that previous removal or eſcape, which, as well from the title and general ſcope of the Act, as from the immediately preceding and contiguous words in this very ſentence, appears to have

have been the cardinal fact, in contemplation of the Legiſlature.

Indeed the firſt of theſe interpretations I am ſo far from holding to be the *only* rational one, which the expreſſions can receive,—that ſo to interpret them, would, as it ſeems to me, be (at ſome expence of grammatical correctneſs) to violate the liberty of a ſubject,—to contravene the ſpirit of the Habeas Corpus Act,—and to ſap ſome of the beſt principles of our truly valuable Conſtitution.

I therefore ſhould, with little heſitation, conſtrue theſe words, if they alone were placed before me, as if the ſentence ran, "ſhall eſcape, go into, or" (having done ſo) ſhall "reſide or be." In other words, I ſhould hold the Legiſlature to have deſcribed a tarrying or reſidence, following upon, and having commenced with a removal.

But it is enough for me if, without too great ſubtilty of refinement, the words will admit of more than one interpretation. For then we may inſpect the whole of this* and other ſtatutes;—revolving at the ſame time, the maxims of our Law and Conſtitution, in order to decide which of theſe poſſible expoſitions is the right one. Thus it is, that the policy of the law comes under our conſideration: a due reſpect for Parliament

* Agreeably to the maxim of Sir Edward Coke, that a ſtatute ſhould be expounded, totâ lege inſpectâ.

ment inducing us to conclude, that a conſtruction which renders their Act impolitic, muſt be a falſe one.

Having entitled myſelf to this latitude, I ſhould yet begin the inveſtigation by reſorting, *not* to any other ſection of the ſtatute, nor even to the recitals or introductory parts of this;—but, confining myſelf to the context of the *enacting paſſages themſelves*, I would obſerve, that if the expoſition which I diſſent from be adopted, the words "*eſcape*," "*go into*," and "*reſide*," will be impliedly rejected as ſuperfluous and uſeleſs; inaſmuch as in this view, the ſingle ſweeping expreſſion, the deſcriptio generaliſſima, "*ſhall* AS" —would comprehend every caſe, to which the other words could by poſſibility extend. Invert the order; and the ſuperfluity becomes more apparent.—"If any perſon ſhall be in, "reſide in, eſcape or go into." This would be as if a ſtatute were to ſay—if any quadruped, or horſe, or dog, or cat, &c.

On the contrary, the conſtruction for which I contend, beſides being perhaps more conſonant to the rules of grammar, and certainly far more favourable to the ſubject's liberty, is alſo more conformable to an eſtabliſhed rule of interpretation: becauſe, inſtead of expunging any words which the Legiſlature has introduced, it gives (by the removal of tautology,) ſome degree of meaning and efficacy to them all.

For,

For 1ſt, a perſon may, after warrant, *eſcape* into Ireland:

Or 2dly, without *eſcaping*, (according to the technical meaning, or even ordinary acceptation of that word,) he yet, after a warrant ſhall have been iſſued, may *go* thither, on (perhaps) his ordinary occupations:

Or 3dly, having, *before* the iſſue of the warrant, abſconded, or without abſconding, arrived there,—he may, at the time of its iſſuing, be reſident in Ireland:

Or 4thly, he may *be* there, not as a fixed reſident, but merely as a tranſient and temporary ſojourner.

For theſe ſeveral caſes, the Legiſlature, according to my conſtruction of their ſtatute, will without plainly tautologous repetitions, have provided; and prevented any quibbling evaſions of the Law, by a perſon who might otherwiſe be beyond the letter, whilſt his caſe was within the ſpirit of it.

Again, the authority, which this ſection of the ſtatute gives, is reſtricted to offences committed againſt the laws of England, or of Scotland; (recognizing, by the way, their diſtinctneſs from thoſe of Ireland.)

Now though there may be caſes, where a perſon, himſelf in one place, can yet commit a crime within another, ſtill theſe are but rare exceptions to the general truth of the poſition, that

that whoſoever is guilty of a crime, muſt himſelf, at the time of its perpetration, be in the place where it is committed.

This general truth is much more likely, than exceptions of rare occurrence, to have been within the contemplation of the Legiſlature;—who may be therefore intended to have directed the proviſions of their Act to the purpoſe of making perſons amenable, who having *been in* England or Scotland, and there broken the law, ſhould afterwards quit the ſcene of their tranſgreſſions; and get beyond the ſphere of the juriſdictions which they had defied.

Thus *firſt*, whether after warrant iſſued, they ſhould *abſcond*, or only *migrate:* or *ſecondly*, had previouſly to its iſſuing, *already* eſcaped, or gone into Ireland; or *thirdly*, whether they were temporary ſojourners, or permanent reſidents in that country,—all theſe would be immaterial and nugatory inquiries. In each caſe, the Arm of the Law, no longer halting, would overtake them: would annull the pernicious effects of their migration; and make them reſponſible for the offences which they had committed.

But ſtill, an indiſpenſable requiſite in each caſe,—a preliminary *ſine quâ non* would be, that they *had been in* England or Scotland, (as the caſe might be,) and having there tranſgreſſed the local law, had afterwards withdrawn themſelves from Britiſh juriſdiction.

The

The words "*againſt whom a warrant ſhall be* "*iſſued*," (in this ſection,) may not have been enough conſidered, or made uſe of, to aſſiſt us in conſtruing the words "reſide or be."

If it had merely been enacted, that "if any "perſon, againſt whom a warrant ſhould be "iſſued, for a crime of which he had been guilty "in Great Britain, ſhould eſcape or go into "Ireland," ſuch words might only include the caſe of a migration ſubſequent to the iſſue of ſuch warrant;—and criminals withdrawing themſelves in the interval between the commiſſion of the offence, and the iſſue of the warrant, might thus evade the Law. Therefore, the words "*reſide* or *be*" are properly ſubjoined. Theſe latter words include a greater portion of time; and extend the proviſions of the Act to the caſe of a migration, ſubſequent indeed to the crime, but previous to the warrant.

And this conſtruction is ſupported by the following facts, viz. that the ſtatute, which we are now expounding, is taken from an Act paſſed for the caſe of England and Scotland, in the 13th of the King; and which is itſelf derived from, and in ſome degree compounded of, two Engliſh acts for county and county, paſſed in the 23d and 24th years of George II. The firſt of theſe latter Acts uſes the words "*eſcape* "or *go into*," merely: whereas the ſecond, without altering the ſcope or meaning of the

former, added the more comprehenſive words, *reſide* or *be*. Plainly, becauſe the letter of the earlier ſtatute had failed to reach a caſe within its ſpirit; viz. a removal from one county to another, before the iſſuing of the warrant, though after the commiſſion of the crime. A collation of the preambles of the 23d and 24th of Geo. II. *puts this matter beyond doubt;* and proves that the words "*reſide, or be,*" were inſerted in the latter Act, *merely* on this account:—and the general preamble of the 44th of the King, (which is, properly ſpeaking, diſperſed and ſcattered through the firſt, third, and fourth ſections,) is, ſubſtantially a mere compilation from thoſe two preambles; and therefore ſhews, that the words "*reſide or be*" have been introduced, eodem intuitu, into this recent ſtatute.——I ſay firſt, that the ſtatute now before us, contains no *general* preamble; except one, formed by a collation of the introductions of its firſt, third, and fourth ſections. For the firſt of theſe is confined to removals from one Iriſh county to another: the third, to migrations from Ireland to Great Britain; and the fourth, to eſcapes from Great Britain into Ireland: whereas the *general* purview of the Act extends to all thoſe caſes; viz. of eſcapes from county to county; and reciprocally from each of the iſlands to the other. Secondly, thus *collected*, the general preamble of the Act before us, is ſubſtantially equivalent

equivalent to the joint preambles of the 23d and 24th of Geo. II.—The only difference is, that the 24th of his late Majeſty, being an amendment of a former ſtatute, of courſe contains a ſpecial and pointed recital, of the omiſſions and inadequacies which it meant to cure;—whereas the 44th of the King, being no amendment of any former Act, includes no ſuch reference, nor any ſuch recital.

Another enactment, of the fourth ſection of the preſent ſtatute, ſeems to favour my opinion, that the caſes which Parliament had in contemplation, were thoſe of perſons who had been in Great Britain; and having there offended, removed afterwards to Ireland.

The paſſage to which I allude is that, by which the Britiſh Magiſtrate "is authorized to "proceed with regard to ſuch perſon," when brought before him, "as if he had been legally "apprehended in England or Scotland."—That is to ſay, as if he had not quitted the country, of which he violated the law.

Excepting the few digreſſive remarks which have juſt occurred, I have hitherto confined myſelf, not only to the fourth ſection of the 44th of the King, but to its mere *enacting* parts, without drawing any arguments from its preamble, or recitals.

I now, *without travelling beyond this clauſe*, would conclude my obſervations on it, by calling the

the attention of my hearers, to the introductory ſentence;—which expreſsly ſtates, that the evil and "inconvenience," for "remedy" of which, its proviſions are enacted, is "the *eſcape* into "Ireland, of perſons guilty" (not of offences, but) "of crimes, in England or Scotland."

But this introductory ſentence goes farther ſtill. The evil, to which it proceeds to apply a remedy, it ſtates to be the *like* inconveniency, with that recited in the preamble, and corrected by the proviſions, of the *preceding* ſection.

Thus the introductory part of the third ſection becomes, by reference, incorporated with that of the fourth; and we may have, and ought to have, recourſe to the former, for the purpoſe of explaining the doubtful enactments of the latter.

What, then, are the introductory recitals of this third ſection?

1ſt. That it may happen,

2dly, That felons, and other *malefactors*,

3dly, *In* Ireland, or Great Britain,

4thly, Make their *eſcape* reciprocally *from the one Iſland to the other.*

5thly, *Whereby* their offences often remain *unpuniſhed.*

6thly. By reaſon of there not being *ſufficient* proviſion by the *laws* in force in Great Britain and Ireland *reſpectively*, for apprehending and tranſmitting *ſuch* offenders, to the

the country *in* which their *offences were committed.*

7thly. That for *remedy thereof*, it be enacted, as then follows.

Theſe ſeveral paſſages, forming a preamble, which belongs as properly to the fourth ſection as to the third,—I ſhall now proceed to conſider ſeriatim.

1ſt, The words, "*it may happen that malefactors* "*eſcape*," are proſpective; and, when connect- "ed with the following expreſſions, "*ſhall reſide* "*or be*," ſuggeſt a reſidence,—enſuing upon ſuch preliminary elopement.

And, by giving a different interpretation to theſe latter words, we might be guilty of more than a merely critical tranſgreſſion. We might turn this Act into an *ex poſt facto* law; which ſhould not only bring a ſtale offender to juſtice, by infinite, (or at leaſt indefinite) *retroſpection*; but might, after a lapſe of many years, pervert a lawful action to a crime. As where, for inſtance, the act prohibited in England, had been, when done in Ireland, permitted by the laws of that then diſtinct, and independent realm. Thus the ſtatute would be conſtrued to do that, which thoſe who oppoſe my conſtruction, not only admit, but *inſiſt* that it has not done: it would create, not merely a new amenability, but a new offence.

2dly, If

2dly. If the term *malefactor*, (not found in the firſt ſection, which extends clearly to inferior offences,) be applied to perſons charged with trivial miſdemeanors, the application will at leaſt be novel and unuſual; and can only be ſupported by obſolete reſearch.

To ſuppoſe that Parliament intended to deſcribe, under the opprobrious title of malefactors, perſons guilty of the ſlighteſt and moſt pardonable tranſgreſſions, might be to impute to them phraſeology, diſproportionate at the leaſt. Such a conſtruction would ſtigmatize as a malefactor, any man, who under the influence of the moſt intolerable provocation, committed a merely *conſtructive* aſſault; by raiſing his hand, without ſtriking the provoker. It would aſcribe to the Legiſlature the improbable intention, that if, after having lifted his hand in England, any buſineſs or accident brought ſuch a man to Ireland, he might, after the interval of half a century at leaſt, be hurried without bail or mainprize on board ſhip; and carried back *to the place from whence he came;* and which ſuch a conſtruction would transform, from the abode of freedom, to a gaol.—The place where he had been betrayed into this imprudent geſture; and where, after a tedious impriſonment and irkſome voyage, he might probably, on conviction, be fined ſixpence, and diſcharged.

What

What a horrid inſtrument of envenomed and oppreſſive vengeance, in the hands of an implacable and malignant foe, might—not the ſtatute, but this perverſion of it, ſupply!—Can we believe that, by the epithet *malefactor*, Parliament deſignated ſuch a venial treſpaſſer as I have deſcribed?—Yet, unleſs we believe them to have ſo intended, the caſe of Judge Johnſon is not within the deſignation. For a libel is no more than a miſdemeanor: and if perſons charged with libelling—be *malefactors*, we muſt admit that the grievouſly outraged man, who merely elevates his hand againſt his reviler, is likewiſe a *malefactor;* and, as ſuch, within the law.

Indeed *Libel* ranks beneath even the ſlight tranſgreſſion which I have noticed. For a libel *not being*, but only *at the utmoſt tending to*, a breach of the peace, is not an offence, for which ſureties of the peace could be required; if we may truſt to the authority of 1ſt Lev. 139; and to the judgment of Lord Chief Juſtice Pratt, in the caſe of the King againſt Wilkes; as reported in IId Wilſon, in the State Trials, and in a Digeſt of the Law of Libels.

Indeed, though his Lordſhip there declares it to be "abſurd, to require ſurety of the peace from a libeller,"—yet he ſeems to admit that there was one caſe, (I mean that of the ſeven Biſhops,) in which the contrary opinion had been maintained. But as he denies that caſe

to

to be law,—or an authority to prove any thing, ſave "the miſerable condition of the times" when it occurred,—I could not, upon the whole, deſire to ſee doctrines, recognized in the caſe of the ſeven Biſhops, uſed to ſanction proceedings againſt the twelve Judges of this country.

This doctrine of Lord Camden, that ſureties of the peace *cannot* be demanded of *a libeller*, becomes more material in ſupport of my argument, and in excluſion of libellers from the claſs of *malefactors*, if we collate it with IId Hale, P. C. 136; where it is laid down that *malefactors may be bound* to their good behaviour.

In Wilſon, my Lord Camden is made to expreſs a farther opinion; viz. that it is abſurd to require *bail* of a libeller. But not being able to reconcile this latter expreſſion with either principle or practice, or with other dicta, which occur in the ſame caſe, I preſume that the Reporter muſt have made ſome miſtake.

Therefore, declining to avail myſelf of a doctrine, which I cannot underſtand, I confine myſelf to repeating, that a libel is no more than a miſdemeanor; and that all ſuch offences are bailable at the leaſt. (Com. Dig. tit. Bail, F. f. 3. page 661.)

And though the moral turpitude of ſome libellers may greatly exceed that of the conſtructive aſſailant whom we have noticed, yet there might be

be libels, which in foro Conſcientiæ, (the tribunal where all diſcretionary puniſhment is defined,) would be little, if at all, more culpable than his aſſault.

Libels include many and various ſhades of guilt; from atrocity of the deepeſt gloom, to a twilight verging the pure horizon of Innocence itſelf.

There are libels, which are falſe and poiſonous. There may be others, which are true: and which might be harmleſs,—if it were not for the proud and angry paſſions that they rouze. Enraged to find their faults, or abſurdities expoſed, Vanity may tempt thoſe who are ſo detected to break the peace; and thus the malice of the libelled ſerve, in ſome degree, to conſtitute the guilt of him that libels: the tendency of ſuch publications to create animoſity, being according to Sir William Blackſtone, (4th. Com. 151.) the whole of what, in a criminal proſecution, the Law (until conviction) can conſider.

The caſe of unwritten defamation is widely different. There, the words muſt impute a crime; and muſt impute it falſely. In ſuch caſes, therefore, there is a *malum in ſe* on the part of the (yet not proſecutable) offender; and towards conſtituting *this* ſlanderer's guilt, we need not have recourſe to the ſpite of his opponent.

That I do not miſrepreſent the law, by ſuppoſing the caſe of a *true* libel, cannot be denied.

For, from the eſtabliſhed maxim, that on an indictment the truth of the libel will be no defence, we muſt infer that ſuch anomalies, as true libels, may exiſt.

But, feeling that what *technically* amounts to libel, may ethically be a ſlight and trivial fault, not only the Judges of the King's Bench, the Custodes Morum of the country, will generally refuſe an information, unleſs it be pointedly and diſtinctly ſworn, that the written charge is untrue; (Dougl. 284.) but after conviction, on an indictment, the Court may take the truth of the writing, and other circumſtances into conſideration; and inflict a mitigated puniſhment in a venial caſe. Inſomuch, that after his voyage and confinement, the Libeller, like the Aſſaulter, might have to pay no more than ſixpence in the ſhape of fine.—In ſuch an event, how ſtinted would the vengeance of a reſentful proſecutor be, who was not permitted to carry his victim, without bail or mainprize, beyond ſea!

Again, another ſpecies of libel might be remedial; if it were not that no tranſgreſſion of the Law can be ſo held; and that the vanity and ſelfiſh paſſions of thoſe, whoſe conduct they regarded, might cauſe ſuch writings to irritate, where they would otherwiſe correct.

So far from being likely to find a modern Ariſtides, who, at the deſire of an obſcure and illiterate fellow citizen, would himſelf write the unjuſt

unjuſt ſuffrage which ſhould exile him from power, we might ſometimes, amongſt future Stateſmen, meet with thoſe, who would ſeek to cruſh with the heavieſt vengeance of the Law, ſuch as truly exhibited their errors to a ſuffering public; and would try to aſcend by ſteps, not of legiſlative frame, but of their own unconſtitutional conſtruction, to the very pinnacles and loftieſt apices of our code; in order to pounce with the greater force, upon their quarry, from a diſtance.

Therefore, no libel can be regarded as being uſeful in fact,—any more than it is permiſſible by law. But the ſhades of criminality, as we have ſeen, are very various:—and, as by our preſent deciſion we eſtabliſh a general rule,—it ſhould be aſſumed that the caſe before us is one as venial, as might, by *poſſibility*, occur.

Let me not be underſtood to ſay, that the preſent is a caſe of ſlight tranſgreſſion. It might, on the contrary, turn out to be one of deep enormity. It will be for a jury, if the matter ſhall come legally before them, to pronounce whether the Priſoner be innocent or guilty; and if the latter, it will be for the Judge, in meaſuring the puniſhment, to define the atrocity or ſlightneſs of his offence. Meantime, I aſſume the caſe to be a venial one; merely becauſe ſuch a caſe might occur; and to ſuch a caſe our preſent deciſion would apply.

If I ſought to give examples of leſs pardonable

able defamation, I might inſtance a groſs libel on his Majeſty, and on our eſtabliſhments in Church and State; ſaid to have been publiſhed, I will not ſpecify when or where; ſo that to no publication can my deſcription be applied, which does not come glaringly within it, by being a ſeditious libel. I might notice a moſt calumnious and groundleſs rumour, which ſome malicious ſlanderers ſent forth,—that perſons connected with the Government, forgetful of ſuch connexion, gave this libel encouragement, and circulation. I might advert to a ſcandalous report which went abroad, that a perſon, pointing at one of the Judges as he adminiſtered juſtice from the bench, was heard to ſay, "That ſcoundrel will not "long ſit where he is: ſufficient evidence is pro-"cured againſt him." I might remind my hearers of ſome printed ſcandal, directed againſt the magiſtrates of a reſpectable county; and involving in its obloquy, the general loyalty of Ireland;—or I might allude to a piece of ſlanderous deriſion, contemptuouſly inſcribed to Mr. Juſtice Fox; and falſely attributed to a gentleman of the Bar. I might throw in the example of the like pus atque venenum, levelled againſt me; and ſubſcribed with a real or fictitious author's name. In this invective, (erroneouſly, perhaps, aſcribed to a penſioner of Government,) I am (in order to promote a due reſpect for the adminiſtration of Juſtice,) repreſented to the public,

in

in my judicial character, as vain, empty, capricious, ignorant, ill-tempered, malignant, ſervile and corrupt. I might hint at a falſe rumour, which ſome have contrived to ſpread,—that the Preſs of this country, whoſe freedom, on the contrary, ſo ſtrongly ſupports our Conſtitution, has been ſuffocated by the combined efforts of Menace and Corruption. Or, laſtly, I might recal an equally falſe report, that one Judge was publicly declared to have compoſed thoſe writings, for which another Judge is now ſaid to be indicted. Such a declaration is by Rumour alleged to have proceeded from one, whom no man that knows him, can reſpect more than I do: whoſe public virtue I will admit to be equal to his private worth; and who, if he were a monarch, might, I doubt not, prove a father to his country.

If it were certain that the above caſes had occurred, I perhaps might cite them as inſtances of heinous defamation. But I cannot well ſuppoſe them to have all happened: and even if they had, I ſhould feel more pleaſure in commending (though to ſome portion of this praiſe I might myſelf perhaps lay claim,) the lenity, which has forborne to take proceedings againſt ſuch offenders.

If I have been endeavouring to dilute the criminality of libel, and reduce it to its proper, and its legal ſtandard, I might refer it to ſome

perhaps

perhaps of thoſe who hear me, whether it would be eaſy to pitch upon a man, who has fewer motives for being partial to calumny, than I have.

I therefore proceed with the leſs ſcruple to obſerve, that it is no anſwer to what I ſometime ago objected, to aſſert that libel being *maleficium*, he who is guilty of it is *malefactor*. The argument would prove too much; and therefore it proves nothing. "*Crime* and *miſdemeanor*," (ſays Judge Blackſtone) "are, properly ſpeaking, ſynonimous terms."—Yet who would pronounce that a ſtatute, purporting to relate to *crimes*, muſt *therefore* be extended to miſdemeanors? When the ſame learned commentator informs us farther, that, by the *Norma loquendi*, common uſage, the word *crime* denotes offences of a deeper dye; while ſmaller faults are compriſed under the gentler title of *miſdemeanor*.

Indeed, if *maleficium* were the radix, from which theſe ſtatutable *malefactors* ſprung, then every perſon guilty of a *tort*, every wrong-doer might be a malefactor, within the meaning of this Act. For, every civil action, which is not founded on a contract, ariſes (and is held to do ſo) ex maleficio, or delicto; and the general iſſue which a jury, in theſe latter caſes, has to try, is whether the defendant *be guilty* or *not?*—Thus a man charged with ſuch a *converſion* as might merely entitle the plaintiff to recover againſt him in trover, being accuſed of maleficium,

um, would be a *malefactor*, by the ſtatute in that caſe made and provided; and as ſoon as the declaration (i. e. charge) was on the file, might, if the venue were laid in England, be hurried over, without bail or mainprize, to that country.

Or again, (and note the dilemma,) reſtrict the operation of the Act to public wrongs; and mark what follows from the conſtruction which I oppoſe. He who ſpeaks the foulеſt, falſeſt, and moſt injurious ſcandal, is not an object of legiſlative rigour: whilſt he who writes and publiſhes what is ſtrictly true, and eminently venial, and only provoking, becauſe the perſon written againſt is vain,—ſhall be caught within the talons of this (ſo conſtrued) penal law.

The above alluſion to *delictum*, and forced conſtruction, which it is ſought to put on the word *malefactor*, reminds one of what is recorded by Lord Clarendon and Mr. Hume, to have taken place in the diſturbed reign of the unfortunate Charles I.

The ruling Powers (ſay theſe hiſtorians) then invented "the term *Delinquents*; to expreſs a degree and ſpecies of guilt, not exactly known, or aſcertained. In conſequence of which invention, many of the nobility and prime gentry found themſelves involved in the crime of *delinquency*. Whoever incurred the diſpleaſure, or ſuſpicion of Adminiſtration, was committed to priſon, and proſecuted, under the notion of delinquency.

" delinquency. After all the old jails were full, " many new ones were erected; and even the " ships were crowded with the gentry; who " languiſhed below decks; and periſhed in thoſe " unhealthy confinements: while the Govern- " ment in the mean time eſtabliſhed the maxims " of rigid law; and ſpread the terror of its own " authority."

From the ſecond paſſage in the preamble to the third clauſe, (which by adoption is become the preamble to the fourth,) I therefore am inclined to pronounce, that the offence charged upon Judge Johnſon not being one of the *majora crimina*, he is not by common uſage, or in technical language, a *malefactor*: that, conſequently, his alleged tranſgreſſion was not in the contemplation of Parliament; and that on this ground he is exempt from the operation of the preſent Act.

It is true that this argument might operate to protect a perſon, who having committed a groſs and aggravated miſdemeanor in Great Britain, had removed into this country, to elude the law:—and thus a miſchief would ariſe; and an intention be fruſtrated, which it might not be unreaſonable to attribute *conjecturally*, to the Legiſlature. Then let our lawgivers, (if to their wiſdom one ſeems wanted,) frame a ſtatute, which without departing from the legitimate rules of conſtruction, we may interpret to embrace ſuch miſdemeanors, if attended with eſcape.

But

But let us not meantime found conjectures as to the intentions of our Parliament, on matter *dehors* the Act which we are reading, and ſtill more *dehors* the maxims of the free Government under which we live.

Let not thoſe who but now, impriſoning themſelves within the enactments, refuſed to ſearch for the lawgiver's intention in even the neighbouring preamble, inconſiſtently entrench on the extenſive ground of vague ſurmiſe, to make a breach in that conſtitutional mound of freedom, the Habeas Corpus Act; by rejecting bail from one charged with a merely bailable offence,—on the ſpot where the capture has been made; and where Law and Juſtice concur in directing that bail ſhould be received. Let us not make a practical and pernicious *bull*, in endeavouring to ſecure a part, by a ſacrifice of the whole: in removing the foundation, to complete or decorate the building. Let us not commit a more heinous offence than libel, by ſo ſtraining an Act of Parliament, as to riſk ſubverting the Conſtitution. Let us on the contrary recollect, that one of the moſt fundamental principles of law is this, that no man, apprehended for a miſdemeanor, who can find ſecurity for anſwering a charge, of which the law preſumes him innocent,—ſhall be deprived of his liberty for a ſingle moment; or removed even an inch from the ſpot where he was taken:—much leſs *exulet*,—*vel utlagetur*,—*vel*

aliquo modo deſtruetur. Much leſs ſhall he be ſent an impriſoned exile from his country; an outlaw, beyond the ſphere of his native code;—to be ruined in his health, his character, and fortune; —and this perhaps for the loweſt of all offences: the ſtatement of a truth, by which ſome vindictive man, inſtead of being corrected, is annoyed.

No; as yet the Bench of Ireland is independent. If it ceaſed to be ſo, I ſhould ceaſe to ſit upon it: and while it does (and may it long!) continue free, I will never convert myſelf into a legiſlator by conſtruction;—for the purpoſe of repealing the Habeas Corpus Law, or abrogating Magna Charta. That Legiſlature will annul either, I am far from fearing or predicting. But if ever it ſhould be their intention ſo to do,—the words reſorted to for the purpoſe, in order to their being efficacious, *muſt be expreſs.*

Thirdly the malefactors, ſpoken of in this preamble, are deſcribed as being *in* Ireland or Great Britain: that is to ſay, (whilſt we are conſidering the fourth clauſe,) as *in* Great Britain.

Thus this paſſage is conſiſtent with the reſt; and favours my idea, that to give operation to the ſtatute, the offender whom it is ſought to arreſt in Ireland, ſhould have been *in* Great Britain when the offence was committed.

Fourthly: the laſt mentioned ſentence, if it wanted explanation, is explained by the ſtatement which

which next follows; that ſuch malefactors may *make their eſcape* from one iſland to the other: —to remedy the miſchief ariſing from which *eſcape*, is the object which the Legiſlature profeſſes to have in view.

Now how a perſon, already in Ireland, and there quieſcent, could contrive at the ſame time to be eloping from England thither, I confeſs myſelf at a loſs to comprehend.

Indeed this appears to me to be one of thoſe impoſſibilities, which are equivalent to a change of ſexes; and which therefore, on the authority of Lord Coke, we may doubt the competence of Parliament to enact.

Therefore, Judge Johnſon having been in Ireland, from the year 1802 to the preſent time, muſt have found it impracticable to eſcape thither in 1804; and conſequently cannot be within the meaning of the Act, ſo far as this preamble guides us to its true conſtruction. His caſe not being within the evil, is not within the remedy.

On a matter not before me, I am not bound to give an opinion. But it might perhaps, with more than plauſibility be doubted, whether in the caſe of *higher* miſdemeanors, attended with eſcape, there would be unreaſonable rigour in refuſing bail from the offender, until he was reconveyed within the pale of thoſe juriſdictions from which, after outraging them, he

he had retired. The elopement might at once be evidence and an aggravation of his guilt, ſufficient to render him, properly ſpeaking, a malefactor; and juſtly to deprive him of part of the privilege of bail. Beſides, his eſcape was a wrongful act: of which we perhaps ſhould be allowing him to take advantage, if we admitted him to bail, before he were brought back. But to make this reaſoning apply, there muſt be *an eſcape;*—and the rule ſhould be confined to miſdemeanors of a ſerious nature. In a word, it will be for the Legiſlature to make ſuch a rule, if ſuch be wanting. I merely doubt whether it can be collected from a ſound conſtruction of the Act before us.

Fifthly (to return;) the preamble goes on to ſtate, that the only way in which theſe eſcapes are miſchievous, is this,—viz. that *thereby*, the offences remain unpuniſhed. Now thoſe who apply the enacting words which follow, to the ſituation of the preſent Priſoner, lay the baſis of thoſe enactments in a falſe recital. For the recital would be untrue, if it were interpreted to ſtate, that in the caſe before us, any ſuch miſchief or *impunity* need ariſe.

The miſdemeanor, charged to have been committed by this malefactor *in England*, is a libel: and for any thing we can know to the contrary, a venial libel,—containing nothing but the

the truth. The definition of libel, as we have already ſeen, muſt be comprehenſive,—in order to be commenſurate with the ſpite and inſolence of Man.

Thus the neceſſity for drawing a line conſtrains us to admit a doctrine, which might (I grant) be puſhed to inconvenient lengths. The proſe writer, who by depicting their deformity, endeavoured to ſcare or baniſh Slavery, or Vice, might be puniſhed as a libeller, when he hoped to be honoured as a reformer,—for having unwittingly ſketched a likeneſs of ſome tyrant or malefactor, as ſtriking and as caſual, as that which we have ſeen of *Chaucer*, traced by the ſportive hand of Nature, on a pebble:*—while the poet, who deſerting the ſafe labyrinth of "no meaning," ſhould raſhly venture to "tell either truth, or lies," might repent him, as bitterly as *Horace*, of his Iambicks: or if he ſtrayed into a perhaps not "needleſs alexandrine,"—but one which on the contrary, the ſubject much required, might find that, agreeably to the critic's prediction, he had to do with "a wounded ſnake."

Let me again proteſt againſt being ſuppoſed to aſſert the truth of the publication, which has produced the queſtion now before us. It would indeed be the reverſe of true, if it denied the worth

* In the Britiſh Muſeum.

worth or honour of the juſtly reſpected, and truly excellent Lord Hardwicke: if it diſparaged the knowledge, or impeached the integrity, of Lord Redeſdale; or repreſented my eſteemed friend, and upright brother, Mr. Juſtice Oſborne, as a man of corrupt principles, or meanly pliant diſpoſitions.

But its contents are not judicially before us: nor if they were, could our deciſion properly turn on their enormity. Reſting upon wider grounds, our determination would extend as an authority, to the moſt venial caſe, coloured with the ſlighteſt and the fainteſt tint of blame. Such a caſe we ought therefore to take the preſent one to be.

Now it appears that the malefactor was *in Ireland*, at the time when the libel is alleged to have been written. Conſequently, if guilty, he muſt be ſo by having tranſmitted it to England.

If he did ſo by dictating the contents to another, this was a publication, for which he may be puniſhed here.

Or if the libel were contained in a letter, written in any Iriſh county, and there delivered to a meſſenger, or put into the Poſt-office, he may be proſecuted, where he thus departed with the poſſeſſion of it. That is to ſay, he is liable to be proceeded againſt, in Ireland. He muſt be ſo, as long as the caſe of *Metcalfe againſt Markham*, in III. Term Reports, is law.

For

For where the one tranſaction is at once a private injury, and public wrong, the ſame circumſtances which would ſuffice to change the venue into a given county, on the allegation that the cauſe of action had ariſen there, muſt alſo furniſh ground of indictment within that county.

Thus, though Judge Johnſon ſhould be guilty, his offence need not remain unpuniſhed; and therefore his caſe does not come within the miſchief, which this ſtatute was emphatically meant to remedy.

While I am upon this ſubject, let me add, that if a caſe were conceivable, (which by me it is not,) where a libeller, without quitting Ireland, could be guilty of publication *excluſively* in England,—and conſequently where, not being amenable to Britiſh power, he would, unleſs by virtue of this Act, eſcape puniſhment *altogether*,—ſtill the preſent Act ſhould not be applied to ſuch a caſe. For we could not draw the line; but muſt likewiſe extend the ſtatute to other caſes, not within the miſchief, againſt which the Legiſlature was providing.

If this Act be defective, it only follows that it ſhould be amended. Meantime our buſineſs is not to add new clauſes; but to expound thoſe which are ſet before us. Beſides it is clearly better that one caſe ſhould eſcape the ſtatute, than that by ſtraining to catch this, we ſhould graſp others, which Parliament never intended to include.

Reſorting

Reſorting to conſiderations of policy, as guides to ſound conſtruction, I would obſerve, that ſuch an extenſion might produce the moſt unconſtitutional effects.

It might enable a Government in Ireland, (I advert to future, and merely poſſible, not actual circumſtances or times,) which found its conduct ſtrongly animadverted on, and choſe to conſider the animadverſion as nothing the leſs libellous for being true,—to withdraw the trial of the queſtion from an Iriſh tribunal, and take it from a jury of the vicinage, to the inhabitants of (juridically) a foreign country:—to perſons leſs cognizant of the ſituation,—leſs anxious for the liberties,—leſs intereſted in the welfare of Ireland than we muſt be,—and who would be leſs expoſed to the oppreſſions of its Government, if theſe exiſted:—to perſons of whom ſome, (as there ſeems too much reaſon to apprehend,) know about as much of the ſituation and intereſts of this country, as they do of the interior of Africa, or of the kingdom of Ava.

It might enable them to remove the caſe, to a tribunal leſs competent than our own to pronounce upon that truth, which may be urged to extenuate, though not to juſtify the offence.

It might enable them to make choice of a tribunal, judging of the ſtate of this country, and the conduct of its Government, from the reports made by thoſe very miniſters, who thus changed

the

the *venue*, from the place where (if any where) the crime was *actually* committed, to where it was only perpetrated by *conſtruction*: miniſters, who might detain their opponent without bail or mainprize,—hurry the moſt dignified of our magiſtrates on board ſhip, and convey them, in the guiſe of felons, to another country,—there to regain their liberty, when they could prevail on ſtrangers to be their bail, there to abide their trial, without the power of enforcing the attendance of witneſſes, to prove their caſe.

When the Legiſlature ſhall plainly enact that this may be done, then, but not ſooner, let us recognize a law, which to common eyes, and perhaps but ſuperficial obſervation, appears ſo little favourable to the liberties either of the ſubject, or of the preſs.

The time might come, when ſuch abuſes, as I have been noticing, would prevail.

I ſhall here take the liberty of digreſſing to a collateral ſubject; nearly connected however with the principal inquiry; and ſtill more cloſely allied to what I hold it my duty to aſſert: I mean the reſpectability and honour of the judicial ſtation.

I allude to a letter, (which while I was an aſſeſſor of my Lord Chief Juſtice, I heard read;) written by Sir Evan Nepean, and addreſſed to Mr. Juſtice Johnſon; in which the former very properly ſuggeſts, that it would become the

punctilious dignity of a Judge, to promote rather than obſtruct, the inveſtigation of his conduct; and of the truth of any criminal charge preferred againſt him.

Whether Mr. Juſtice Johnſon be innocent or guilty, is a queſtion neither within my power, nor my province, to decide. It is *quæſtio facti; ad quam Judices non reſpondent.*

But I owe it to the character of that exalted (and I hope reſpected) order, to which I have the honour, (for it is ſtill an honour) to belong, —to obſerve that he does not ſeem to me to have ſhrunk from trial; or betrayed unwillingneſs to be amenable to juſtice.

He has but manifeſted a reluctance, compatible with utter innocence; and which, in ſimilar circumſtances, I ſhould feel: a reluctance to be tried before a diſtant, and comparatively incompetent tribunal; without means of ſecuring the teſtimony of witneſſes in his own behalf.

Beſides, I may ſuppoſe him to have entertained the opinion, which I avow myſelf to hold;— viz. that any arreſt of him, under this ſtatute, is illegal. If ſuch were his opinion, he would have owed it more to the laws and liberties of Ireland, than to himſelf,—to diſpute the validity of an unconſtitutional apprehenſion: and he would, at a moment critical to the Bench, and to the Country, have been a traitor to the privileges and independence of his order, and to the freedom, laws, and Conſtitution, of the iſland which gave him birth,

birth,—if he had not acted precisely as he has done:—by eluding, with an address and presence of mind which do him credit, what might have seemed, but certainly was not, an attempt to hurry him beyond sea, with a celerity, which should outstrip the languid march of the Habeas Corpus.

I impute nothing to those who executed the warrant. It commanded expedition; and perhaps they but obeyed it. But, (spite of the respectable support which it has obtained,) I impute much to a construction, which gives such efficacy to this process; whilst it paralyses an act, on which our liberties depend.

I recoil from an interpretation, which might, in many venial cases, render any resort to the protection of the Habeas Corpus Act, *incompatible* with obedience to the orders of a warrant, which enjoins instantaneous removal by the directest way; and will not tolerate the least delay, or slightest circuity of deportation.

How happy his Majesty's Government ought to feel, that though the attempt was merely seeming, the failure has been real,—to withdraw the Prisoner's claims (valeant quantum,) to liberation, from the cognizance of those legitimate tribunals, which have since sitten in judgment on them!—that in his present infirm state, he is not yet deposited in an English dungeon, there to pine, until humanity should induce stran-

ge-

gers to become his bail;—or until, (wind and weather, and their own liberality permitting,) his friends on this ſide of the water ſhould croſs the Channel for his relief!

If honourable firmneſs in one inſtance, will warrant a preſumption againſt baſeneſs in another, the meaſures taken by Judge Johnſon, to bring the caſe of his country before the Law, rather furniſh proofs of innocence, than imply conſciouſneſs of guilt.

Nor, (to revert to the correſpondence which was read at the chamber of my Lord Chief Juſtice,) is it an anſwer to what I have been urging, to obſerve that the Priſoner might have eſcaped the dangers which have been ſtated, by giving the ſecurity aſcertained by Mr. Marſden; —and meaſured, (as might ſeem, from the letter of Sir Evan,) by the authority of the Under Secretary himſelf; and without the concurrent ſanction of the Lord Lieutenant's pleaſure.

It may be even admitted, that thoſe perils by land and water might have been avoided, by Mr. Juſtice Johnſon's ſigning the undertaking, preſcribed by Mr. Juſtice Bell.

But, in acceding to either propoſal, he would have recognized an authority to arreſt him;—and thus, if my conſtruction of the ſtatute be a right one, would *pro tanto* have compromiſed the laws and liberties of his country. Nor do I wiſh to diſparage the liberality of the Gentleman,

who

who propoſed to Judge Johnſon to give ſecurity for his appearance. I preſume he gave the ſtatute a conſtruction, which is now ſanctioned by great authority; though it ſtrike my humble underſtanding as being unconſtitutional, and falſe.

I therefore interpret as an indulgence, conduct, which might otherwiſe be regarded as a ſpecimen of rigorous ingenuity, and adroit oppreſſion.

I alſo indeed heard, (at my Lord Chief Juſtices,) a third offer made: that if Judge Johnſon would but confeſs himſelf the author of a libel, he ſhould be gratified in his wiſh for a trial in this country. But even this candid and liberal propoſal, one can conceive that an innocent man might poſſibly reject.

For, when turned to familiar language, ſee what ſeems to be its amount.

"Relieve me from the neceſſity of proving, "what perhaps I could not prove. Rebut the "preſumption of the Law that you are inno- "cent; and though you may not come out, "like Barnardine, *to be hanged*, confeſs at leaſt, "that you are guilty.—If you do this, take my "word for it, you ſhall not go to priſon. On "the contrary, I will ſend an iſſue to an *Iriſh* "Jury, to try and inquire whether your con- "feſſion be the truth?—And as for my Lord "Ellenborough's warrant, it ſhall be diſobeyed."

I do not ſay that ſuch was the propoſal: but by a ſimple man it might have been ſo underſtood.

To

To return from this (not foreign or irrelevant) digreſſion. In declining the juriſdiction of an Engliſh tribunal, Judge Johnſon may not eſcape puniſhment; nor is it to be intended that he wiſhes to evade it.

On the charge made againſt him, he may be tried in Ireland;—and in this, as in the other part of the United Kingdom, a ſuitable puniſhment would be the conſequence of his conviction: —for the judicial power is not yet abrogated amongſt us.

That if he wrote the libel, he did ſo in Ireland, is plain from this, that he is ſworn to have been there, at, before, and ſince the time, when his offence is laid to have been committed.

That by writing and ſending it, he became ſubject to a proſecution here, may be inferred, as well from authorities directly in the point,—as (without any caſe,) from the mere reaſon of the thing.

For the writer's ſending of ſuch libel was the *ſine quâ non* to its publicity: and the only act done on his part, procuring another to publiſh; and thereby amounting to a publication by himſelf.

For, not having been in England, he cannot *in any way* have publiſhed there, ſave by conveying thither the manuſcript, from which printed copies were diſperſed.

Now,

Now if, on the one hand, this act be not a publiſhing, he is *unconnected* with the fact of publication in England. The *privity* between him and the circulator of the ſcandal is deſtroyed. The fact of publication being eſſential to his guilt, he thus becomes utterly abſolved; and eſcapes puniſhment, only by being innocent of the charge.

On the other hand, if the writing and ſending amount to publication, they muſt do ſo where they occurred. They muſt do ſo in the place from which the manuſcript has been ſent. Thus, having in Ireland publiſhed the defamation, the wrong-doer may be there convicted, of an offence which he has there completed.

If, (as in the King againſt Doctor Henſey, 1ſt Burrow, 646.) a letter, though intercepted, may be an overt-act of treaſon; and (per Lord Manſfield) one, dated at Twickenham, is an overt-act *in Middleſex*;—and if in Jackſon's caſe, (tried in the King's Bench here,) a letter written in Dublin, and found in the General Poſt-office of that city, was held to be an overt-act of treaſon there,—by inevitable analogy, a libel, put into the Dublin Poſt-office, is there *publiſhed*: nor leſs publiſhed, if delivered to any perſon there. Indeed Comyns's Digeſt, title Libel, Publication, B. I., puts the matter beyond controverſy.

It is no anſwer to allege, (nor am I called on to deny,) that if an offender ſent a libel to London,

don, to be publiſhed, it might be his act in that city; if the publication took place there. (1ſt Strange, 77.)

It is ſufficient for my purpoſe, that the writing and ſending amounted to a publication in Ireland; ſo that, though this ſtatute were never paſſed, the writer *need not eſcape puniſhment:* conſequently that his caſe, not coming within the miſchief which is recited, does not require the remedy which is preſcribed;—and that it would be as unneceſſary, as it might be unconſtitutional, to drag a perſon, againſt whom ſuch an accuſation was preferred,—to a diſtant tribunal,—where the eſſential act of publication by *him*, could not be alleged really and de facto, but merely by conſtruction of law to have taken place;—where no witneſſes, competent to exculpate him, could be found;—and where he could not, by means of compulſory proceſs, collect any.

Such a conſtruction of the ſtatute would not only, at the expence of the perſonal liberty of the ſubject, give a (perhaps vindictive) proſecutor *electio fori*,—but might countenance his making choice of that tribunal, where the perſon accuſed would have the leaſt chance of a fair trial.

To ſuppoſe the poſſibility of malice, which might lead to harſh and oppreſſive proceedings, on the part of a proſecutor for libel, is not to indulge in any conjecture unſanctioned by the law.

On

On the contrary, libel was held a public offence at the common law, for the very purpoſe of turning into a gentler and more innoxious channel, that deſire of vengeance, which the ſame law aſcribed to thoſe, who found their reputations ſported with. (4th Bac. Abr. tit. Libel, p. 449, and the authorities there cited.)

Again, that ſending a libel is a publiſhing, at the place from which it is ſent, may be inferred from hence, that not only he who publiſhes (in the ordinary ſenſe,)—but he who procures another to do ſo, is guilty of the publication. (Com. Digeſt, tit. Libel, Publication, B. 1.)

And if guilty, he muſt be ſo where he perpetrated this act of procurement; though he may, by conſtruction of law, be alſo guilty of the ſame elſewhere. (4th Bac. Abr. 458; and the caſes cited in the margent.)

But what is ſaid by my Lord Coke, ſeems to put the matter beyond doubt; and to aſcertain that the writing and ſending of a libel, conſtitute a publiſhing in the place where thoſe two acts are done. He ſays that if one finds a libel, which concerns a public perſon, he ought to deliver it to a magiſtrate, in order that the libeller may be puniſhed.

Now, if the author had not publiſhed, he would not be a libeller. (Com. Digeſt, tit. Libel, Libeller, C. 1.)

But,

But, in the caſe ſuppoſed by Coke, he has no otherwiſe *publiſhed*, than by ſending a libel which has been intercepted. Therefore writing and ſending muſt amount to publication, at the place from which the libel is ſent.

Be this however as it may, it appears by affidavit, that of this alleged libel, there occurred in Ireland that vernacular ſort of publication, which conſiſts in the diſperſion of printed copies.

And the caſes collected in 3rd Bac. Abr. tit. Habeas Corpus, page 13, and in 2nd Hawkins, ch. 15, prove that of theſe documents, as they do not contradict the return, we may take notice.

Therefore, even thoſe who diſſent from my application of the authorities which I have cited, muſt admit that there has been a conſummation of the offence in Ireland; and conſequently that the offender is puniſhable here.

This conſideration ought, at once, to exempt his caſe from the preſent ſtatute. For the miſchief, to which it profeſſes to apply a remedy, is that of offences often remaining unpuniſhed; —and as well on principles of right reaſon, as in favorem libertatis, we muſt conſtrue theſe expreſſions to deſcribe the miſchief of offences remaining unpuniſhed *altogether*. The object of the Legiſlature *muſt* have been to guard againſt total impunity, or inadequate puniſhment; —which would not occur, where the party was liable

liable in Ireland, to the penalties of his offence.

As to there having been publications in different places, they all however flowed from *a ſingle* act; the *once* writing, and *once* ſending forth the ſcandal:—and to puniſh the author in London, would be, by acuteneſs and technical refinement, to inflict a double puniſhment for a ſingle crime; and ſuppoſe two public Juſtices within the united Realm, inſtead of one.

The writing and ſending are the fundamental and radical offence; from which, and not from any pretended repetitions of it, all the conſequences have ariſen. Therefore Ireland having been the ſcene of this offence, is emphatically the proper ſcene for proſecution.

In a word, if the Priſoner wrote the libel, he muſt have done ſo where he was. If this *can* be proved againſt him, he may be puniſhed here. If it *cannot*, there is no evidence of his publiſhing in England. Therefore, he is puniſhable in Ireland; or he is not puniſhable at all.

The ſixth recital, in the preamble to the third ſection, is the want of a *ſufficient* proviſion, by the laws (recognizing their diſtinctneſs,) of Great Britain and Ireland reſpectively, for apprehending *ſuch* offenders; and tranſmitting them to that part of the United Kingdom,

Kingdom, in which their offences were committed.

This recital ſuggeſts to me the following obſervations.

1ſt. That no law is requiſite for tranſmiting an offender, to the iſland in which his treſpaſs was *conſtructively* committed; when he may be puniſhed in that iſland in which it was *actually* perpetrated. And this Act need not be ſo conſtrued, as to ſupply what was not wanted.

2dly. That the words "SUCH *offenders*" are reſtrictive; and mean thoſe *fugitives*, who had juſt been ſpecified as the objects of the law. The words may be alſo properly referred to the claſs of "*Felons and Malefactors*," already noticed in the ſame preamble; and to which I do not conceive petty treſpaſſers to belong.

Indeed, if perſons guilty of torts or miſdemeanors be malefactors, it can only be becauſe this latter word is *nomen generaliſſimum*. But if ſo, it includes felons: and the laſt mentioned term muſt be rejected as ſuperfluous, by thoſe who would extend this Act to miſdemeanors.

On the contrary, compatibly with my conſtruction, every word may be ſignificant. Felons and other malefactors may mean perſons having committed felonies, *aut alia enormia*.

mia. Malefactor may, for aught I know, or have been able to discover, have a precise and technical meaning in the Scottish law. Even if it have not, its introduction into the Act from which it has been transcribed into the present one, might be necessary and useful. That was an act of regulation between England and Scotland; and there may be, and I believe are offences, atrocious and capital by the Scottish law, which yet are not felonies: if indeed the term felon be *at all* known in that code.

But 3dly, a suggestion of greater weight is this; that unless we extend the operation of the Act before us to misdemeanors, the recital which I have just extracted will be *false*. For it appears from the sixteenth clause of the English Habeas Corpus Act, that persons charged with capital offences had been theretofore transmitted from England to this country: and the previous legality of such a practice, the Habeas Corpus Act may be thought to recognize. At least it sanctions a continuance of the usage. Thus before the existence of the statute which we are interpreting, there was provision for the transmissal of capital offenders.

But this would be so far from rendering the recital false, that the paragraph would be more untrue, if it stated the law to have provided

vided *inſufficiently*, where in fact the law had not provided *at all*.

Then were the antecedent proviſions ſufficient? for if not, the recital before us will be ſatisfied; though we ſhould not extend the Act to the caſe of miſdemeanors.—I conceive them to have been *inſufficient*.

For 1ſt. until the recent ſtatute paſſed, if the Government of the country where the offender *was*, might tranſmit him, at leaſt non conſtat that the Government of the country where he *was not*, could ſend to fetch him. Thus far then the exiſting laws were inſufficient. The preamble truly recites the inſufficiency; and the enacting clauſes proceed to ſupply the defect.

2dly. The practice of tranſmitting capital offenders, from Great Britain and Ireland, reciprocally to each other, was a uſage, between thoſe diſtinct and independent countries, leſs referable to their municipal codes, than to their political connexions, and the comitas gentium, or Law of Nations.

The offender was tranſmitted, not under the warrant of a magiſtrate, but of a miniſter of the Executive, viz. the Secretary: and this warrant was executed, not by a peace officer,—but by another inferior ſervant of the State; viz. a King's Meſſenger.

Therefore

Therefore the Habeas Corpus Act, in permitting ſuch proceeding, rather tolerated ſo much of the law of nations, than ſtrictly enacted the uſage, as a branch of the municipal code.

Let me add, that ſtill leſs does it directly, or by inevitable conſtruction, recognize the PREVIOUS legitimacy of ſuch a practice.

It is doubtful, *at the leaſt*, whether it does not rather confer a new, than acknowledge a precedent *legal* authority. Without deciding on their previous legality, it ſanctions a few innocent uſages, *by way of exception*;—whilſt it prohibits the continuance of ſuch, as were dangerous and oppreſſive.

At all events, that juſtly celebrated ſtatute does not empower magiſtrates to iſſue, nor peace officers to execute, warrants for apprehending or tranſmitting capital offenders. It does not confer on any perſon, a right of demanding ſuch a proceſs *ex debito juſtitiæ*. It does not authoriſe to ſend for the culprit, from the place where he *is not*; but only to remove him from the place in which *he is*. Therefore, though we ſhould reſtrict the operation of the preſent ſtatute, to ſuch *majora crimina*, ſtill the recital which it contains, might be ſtrictly true;—that the proviſions of the law were inſufficient in this reſpect. Nay, the recital might be true, though the Iriſh

Habeas

Habeas Corpus Act contained a clauſe, parallel (mutatis mutandis) to the ſixteenth of the Engliſh: which however, it may be highly material to obſerve, is not the caſe.

Indeed, that previouſly to the Act of the 31ſt Car. II. that legal power did not exiſt, which, in the caſe of felonies, I admit the preſent Act to give, appears from reports of equal authority with any which have been publiſhed ſince: I mean thoſe of Sir Edward Coke; and advert to the caſe of the Lord Sanchar. There, Robert Carliel the *principal* felon, (and he was a murderer,) having eſcaped to Scotland, my Lord Coke expreſsly lays it down that "it was impoſſible, by legal proceſs" (of the Engliſh law,) "to apprehend the body of Carliel, being in Scotland."

What did the King do?

In the firſt place, to uſe the language of this moſt celebrated of our Reporters, "he conſulted," (as was right for the Executive to do,) "with his Judges;" and from their authoritative opinion he found, that "if this fact ſhould be left to the ordinary proceeding of the law, Carliel, *the aſſaſſin*, could not be taken."

In the ſecond place he had, with the beſt intentions, and for a uſeful purpoſe, recourſe to the exertion of one of thoſe extraordinary

prerogatives,

prerogatives, the too ſtrained and frequent exerciſe of which, (cruelly taken advantage of, by the encroaching Commons,) tended to bring his unfortunate ſon and ſucceſſor to the block.

He iſſued his royal "Proclamation:" and, to reſume the words of my Lord Coke, the aſſaſſin "was taken; not "*by any common pow-*"*er*;—but by means of his Majeſty's royal "and *abſolute* power only."

The Britiſh Conſtitution was as yet unſettled. The Engliſh Government had not yet learned, what the Iriſh Nation, I hope, never will forget;—what, ſo long as it is pronounced from the Bench of Juſtice, need not be taught amidſt the claſh of arms;—that in a free country, the *abſolute* power of an executive is unknown.

The caſe which I have been citing, is in the Reports; Part IX. vol. V. pages 120 and 121.

The ſeventh and laſt recital of the preamble to the third ſection is, that the enactments which there follow, are for remedy of the miſchiefs precedently enumerated. Therefore (unleſs theſe enactments be cogently expreſs,) to no caſe which does not come within the miſchief, should the remedy, (to the invaſion of a ſubject's liberty,) be applied.

Thus what I have been urging will amount to this: that the *enacting* parts of the fourth ſection do not, *neceſſarily* ex vi terminorum, or *probably* from the context, apply to the circumſtances before us; while the *recitals* of that, and of the preceding clauſe, inſtead of embracing, will exclude the Priſoner's caſe.

I have not been contending, that the enactments of a ſtatute muſt be ſtrictly commenſurate with its preamble. On the contrary they may be, and are often, more extenſive. I merely hold, that where theſe latter are not explicit, we may reſort to the preamble to explain them. Where the Legiſlature recites a miſchief, and provides a remedy, the *preſumption* is, that a caſe not within the evil, is not within the cure. Stabitur huic præſumptioni, donec probetur in contrarium;—and *to rebut it*, the enacting words muſt be expreſs. Beſides, the conſtruction which I am reſiſting here, would not ſo properly *extend* the enactments beyond the preamble, as *render them incongruous and inconſiſtent with it.* The preamble having recited the miſchief of impunity ariſing from eſcape,—remedies it, (ſay my opponents,) by providing for a caſe where there is neither impunity, nor eſcape.

And perhaps the caſe of the infamous Rynwick Williams, cited in the third edition of Leach, and alſo in Eaſt's Crown Law, might

go

go to ſhew that I have given too great efficacy to the enacting clauſes of a ſtatute: that theſe are liable to more controul from the preamble, than I have ſuppoſed;—and that the letter of a ſtatute (however plain,) ſhall not prevail againſt its ſpirit and general intent.

The determination of the Iriſh Judges, with regard to the White Boy act, goes alſo to eſtabliſh the ſame ſubordination; of letter to ſpirit; expreſſion to intent.

But did the omiſſion, to inſert a recital which ſhould include the Priſoner's caſe, ariſe from inadvertence or precipitation?

It would be diſreſpectful to Parliament to ſuppoſe, that they could hurry over an Act of ſuch importance as the preſent, abounding with perplexing and ſlovenly omiſſions.

On the contrary the preamble to the third ſection, which ſeems accurately drawn, ſtates the caſe of an *eſcape*; and *nothing more*:—being in this reſpect even more confined than the introduction to the firſt clauſe.

Nor if to meet the caſe of an *eſcape*, the Legiſlature made peculiarly harſh and rigorous proviſions, (trenching on the ordinary rights and privileges of the ſubject,) would it do any thing wholly novel and unprecedented. At leaſt it would attempt nothing ſo unuſual,

unuſual, as a conſtruction embracing the preſent caſe—muſt accompliſh.

Accordingly we learn from Sir William Blackſtone, (4th Com. 298.) that "ſuch as "being committed for felony, have broken "priſon, may *not* be admitted to bail: be-"cauſe this eſcape not only carries with it a "preſumption of their guilt, but is alſo ſu-"peradding one crime to another."

The ſame doctrine may be found in 2d Inſtit. 188; and Hale's Pleas of the Crown, 102.

Then whether is it more likely,

Firſt, that the Legiſlature adverted to caſes of an actual and de facto preſence in England, —the commiſſion of a crime there,—and a real or preſumptive eſcape from thence?—and that the Act was intended to nullify this removal,—and by fruſtrating its effects, to prevent the total impunity of the flying offender?

Or *ſecondly*, that they had in contemplation a merely *conſtructive* preſence and guilt in England,—by a perſon who *really* committed, and was reſponſible for, the offence *elſewhere*? —and thus that their object was, not to guard againſt a defiance of the law, but to enhance and multiply penalties for the *ſame offence*,—until the victim, with more reaſon than the firſt-born offender, might exclaim

that

that his puniſhment was greater than he could bear?

To return,—it may not further be improper to remark, that the marginal abſtracts correſpond with the conſtruction which I am giving to this ſtatute. And indeed whether I argue from theſe, from the text, or from the title,—I am diſpoſed to pronounce, that Judge Johnſon's caſe, not falling within the miſchiefs which are recited, cannot come within the remedy which is preſcribed.

But though, until he be found guilty, the innocence of every man is preſumed, yet this Act does not provide the party accuſed with means of compelling the attendance of witneſſes, to make this innocence appear.

Was this alſo one of thoſe *maculæ, quas incuria fudit?* a merely careleſs, giddy, and forgetful omiſſion?—No. It is not our lot to be ſubject to a Legiſlature, which could thus negligently trifle with thoſe liberties and rights, in aſſerting which, ſo much valuable blood has been often ſhed!—On the contrary, the omiſſion to ſecure to perſons ſituated like Judge Johnſon, the means of a fair trial, and a full defence, rather juſtifies my concluſion, that Parliament did not mean to extend their ſtatute to his caſe.

Where the offence was really, if at all committed, *there* the moſt material witneſſes are likely

likely to be found: ſo that in the caſe of *migration*, that proceſs might not be neceſſary, which this Act omits to give. Therefore to caſes of migration the Act was intended to apply.

But, (to recur parenthetically to a former topic,) it may be ſaid, that if "*reſide*" be conſtrued (quoad miſdemeanors,) to mean a reſidence enſuing on an antecedent removal, it muſt in capital caſes, alſo ſignify the ſame. Admitted. And where is the miſchief that will enſue? If the felon perpretrated the act in England, and thence eſcaped to Ireland, he perhaps might go unpuniſhed, if it were not for the 44th of the King. But if at the time of the offence committed, he was reſident in Ireland, he muſt have perpetrated it *there*; and could *there* be puniſhed for it.

And even though his offence were acceſſorial to a principal crime committed in England, ſtill he ought to be puniſhed in Ireland; under the ſpirit of the ſtatute of the 2d and 3d of Edward VI. ch. 24; which whilſt it altered the common law, attended to the Conſtitution; and directed that acceſſorial offences ſhould be tried in the county in which they were committed.—A fortiori, ought the offender to be tried here, where he is not charged with having been acceſſory to a crime perpetrated in the neighbouring iſland; but

is

is accuſed of a ſpecies of offence which does not admit of accomplices; and where if culpable, he muſt be a principal, and have conſummated his guilt in Ireland.

But again, this ſtatute does not provide the means of giving bail in Ireland. Need I prove that this was an indiſpenſably neceſſary proviſion?—Could an Iriſh magiſtrate, without the ſpecial authority of an Act of Parliament, take bail in a matter not within his juriſdiction? and on a charge which he is not bound to know to be bailable, by the Engliſh or the Scottiſh law? How, or to what, would ſuch a recognizance bind the party? By what acts, or what omiſſions, could he forfeit it in this country? Of what Court in Ireland would it be a record? How could Engliſh or Iriſh green wax, or Scotch proceſs iſſue, to levy the amount of this ſhadowy obligation, not to be found amongſt the rolls of any Britiſh or Iriſh court?—What ſhould prevent the pleading nul tiel record, to any attempted eſtreat of ſuch a recognizance?

Where the arreſt is under the warrant of a Britiſh magiſtrate, the taking bail in this country by an Iriſh Judge, would be a deluſive and nugatory proceeding; ſubſtantially equivalent to an unqualified diſcharge.

Indeed this part of the caſe appears to me to be ſo plain, that to dwell longer on it might

ſeem

ſeem unneceſſary, if it were not that I have heard it confidently argued; and that the opinion which I have formed upon the point, ſeems at once capable of being incontrovertibly maintained, and to be nearly concluſive on the true conſtruction of this ſtatute.

I therefore would aſk what is a Recognizance?

Blackſtone anſwers that "it is an obligation "*of record*; which a man enters into before "ſome *court of record*; or magiſtrate, *duly* "*authorized*." (2d Com. 341.)

I ſhould proceed to inquire whether an obligation, entered into before a court of record in *one* country, thereby becomes an obligation of record in *another?*

Firſt, if it do not, the definition which we have juſt extracted from Blackſtone, will not be ſatisfied. A pretended recognizance, entered into before an Iriſh court, will not be an obligation of record in England. In other words, it will be no recognizance there at all; nor binding as ſuch, on the ſuppoſed cognizor.

But *ſecondly*, if a recognizance entered into before an Iriſh (that is to ſay, juridically, a foreign) court, be an obligation of record in England, then either ſuch recognizance is of more efficacy than the judgment of an Iriſh court, or this latter will alſo create an obligation of record in England.

Then

Then in an action brought in England, on a foreign judgment, the declaration might conclude *prout patet per recordum:* the defendant might plead *nul tiel record*; and on ſuch a judgment, *indebitatus aſſumpſit* would not lie.

But on the contrary, the caſe of Walker v. Witter (1ſt Douglas,) aſcertains that prout patet per recordum would be rejected as an improper concluſion; and that the plea of nul tiel record would be equally improper. For both concluſion and plea would erroneouſly imply, that a foreign judgment was a record of a court in Weſtminſter.

And the caſe of Bowles v. Bradſhaw, cited in the notes, proves, if neceſſary, that a judgment of the Iriſh Exchequer is no *Engliſh* record; but a mere ſimple contract; on which indebitatus aſſumpſit may there be brought.

Thus the words, "a recognizance entered "into before a court of record,"—mean entered into before a court of record, *in the country in which it binds:* and otherwiſe it is no recognizance.

"A recognizance," ſays Blackſtone, "is an "obligation of record."

It muſt be ſo: for the King can only take by matter of record.

In England he takes by matter of record there: in Ireland by matter of record in this latter country.

"A recognizance," continues Blackſtone, "is not witneſſed by the party's ſeal." (2d Com. 341.)

And why? Becauſe it derives its authenticity from a higher ſource.

"It is witneſſed only by the record of the "court." (Ibid.)

In other words, patet per recordum:—and (as Lord Mansfield expreſſes himſelf, in the caſe of Walker v. Witter,) "implicit faith is "given to ſuch record."

But his Lordſhip adds, that "the record of "a foreign court is clearly not that ſort of "record, to which implicit faith is given by "the courts of Weſtminſter Hall;" ſubjoining that "the difficulty had ariſen, from not "fixing accurately *what a court of record is, in* "*the eye of the law.* That deſcription is con-"fined properly, to certain courts in England. "Foreign courts have not that privilege."

Be it remembered—is a common initial injunction of records. But lex neminem cogit ad impoſſibilia; and it would be impracticable to remember what never had been known.

Yet thoſe who contend that a man may commit a crime in a country which he has never ſeen; may fly from thence to another, where he has reſided from his birth; and when overtaken, be brought *back* to that which he never quitted;—thoſe I muſt admit

to

to be conſiſtent with themſelves, when they hold that his recognizance may be a record of a court, in which it never was acknowledged or enrolled.

But "a recognizance is an obligation of "*record*, either entered into before ſome court "of record, (being there taken by its officer,) "or before a magiſtrate, *duly authorized*,—and "certified to the court." (2d Bl. Com. 341.)

But if the court of record intended, be an Engliſh court, can we ſuppoſe that, by the word "magiſtrate," a foreign magiſtrate is meant?

An Iriſh juſtice of the peace is no magiſtrate in England. He cannot, without tranſgreſſing the law, preſume to exerciſe *there*, the moſt inſignificant magiſterial functions.

Will a recognizance, oſtenſibly entered into before him who is *no* magiſtrate, ſatisfy the definition of an obligation of record, entered into before one who *is* a magiſtrate?

Shall he, who dare not attempt the loweſt, accompliſh one of the higheſt acts of magiſtracy? or ſhall a perſon before *him*,—that is to ſay *coram non Judice*,— bind himſelf *of record*, and be eſtopped for ever, from contradicting or evading the obligation?

Shall the Engliſh authority, which ſuch a man could not exerciſe in England, flow to him from the circumſtance of his being *out of England*?

England?—Or ſhall an act, performed before an obſcure Iriſh juſtice of the peace, be of record in England, when it would not be ſo, however ſolemnly executed before any of the King's ſuperior courts in Ireland?

I ſay would not be ſo. For I hold that the independence of the King's ſuperior courts in Ireland, acquired in 1782, has not been theoretically forfeited by the Union;—and that the King's Bench in this country is not miniſterial, or ſubordinate to that of England.

I do not deny, that if *duly authorized*, an Iriſh magiſtrate may take and tranſmit a recognizance to England; ſo that it ſhall become an obligation of record in that country. I merely inſiſt, that towards warranting any ſuch proceeding, an authority by ſtatute muſt be given;—and that none ſuch is conferred by the ſtatute now before us.

Nor does this ſeem to have been an overſight on the part of the Legiſlature. They omitted to give this authority by the third and fourth ſections, becauſe it was not wanted: thoſe clauſes being confined to unbailable offences; and to caſes of eſcape.

Where they choſe to confer ſuch power, they have expreſsly done ſo. I mean by the firſt ſection of this ſtatute; where it is ſpecially provided that the endorſing juſtice ſhall take bail; and deliver the recognizance to the conſtable;—who is

required

required to receive, and tranſmit the ſame, to the clerk of the crown of the place where the offender is to appear: and it is farther (and not ſuperfluouſly) enacted, that ſuch recognizance ſhall be good, and effectual in law.

Thus the Legiſlature has evinced, by the proviſions of this firſt ſection, what Law and Reaſon had both ſhewn before,—namely, that without the interpoſition of Parliament, he who has no juriſdiction over the offence, cannot bail the offender: that he who cannot commit another to priſon, is equally incompetent to deliver him to the cuſtody of ſureties: but that an enacting ſtatute is indiſpenſably neceſſary, towards enabling him to take, or to tranſmit a recognizance; and towards requiring thoſe to whom it is tranſmitted, to receive it.

The Legiſlature, I ſay, appears to have decided the queſtion, in providing, by the firſt ſection, that where offences are bailable, the endorſing or other magiſtrate may *take* bail: a proviſion which would be ſuperfluous, if without it the accuſed were entitled to give bail before him.

But the proviſion of this firſt ſection does more than aſcertain the incompetence of the magiſtrate, (unleſs under the authority of its enactments,) to take bail.—It ſhews the attention of Parliament to the privileges of the ſubject.

If then, towards enabling an Iriſh court or magiſtrate to take bail, in a caſe of miſdemeanor, circumſtanced

circumſtanced like the preſent, it were neceſſary that the Act ſhould contain a clauſe, empowering ſo to do,—can we aſcribe to inadvertence, that no ſuch clauſe is to be found?

I have heard this hinted;—and that it is propoſed to have the Act amended in this reſpect.—That would indeed be a ſerious amendment, whoſe operation was to remove—not a partial and temporary ſuſpenſion of the Habeas Corpus Act; but rather its total and abſolute repeal.

The hint has been attributed, with I know not what foundation, to a high and reſpectable law officer of the Crown, who from the commencement of this momentous diſcuſſion to the preſent time, though the proſecution be avowedly a ſtate one, has not once favoured us with his aid or preſence;—ſo that I have had no opportunity of mooting with him the ſubject of this alleged inſinuation.

Indeed his abſence was the more to be regretted, becauſe the delicacy of Mr. Solicitor General's ſituation,—ſaid himſelf to be (what he muſt allow me to expreſs my ſorrow that he ever ſhould be,) an object of aggreſſion in the preſent libel,—has neceſſarily deprived us of his truly valuable counſel.

It is not alleged that the Attorney General is indiſpoſed. It cannot be alleged that he has been occupied by buſineſs of greater importance than this before us; nor aſſerted that he has given up a queſtion,

a queſtion, argued with ſo much ability and candour by the Prime Serjeant:—and ſtill leſs can it be contended, that—aware of a difference of opinion on the Bench,—he has come forward to remove my difficulties, and bring me over to his ſide.

But why he has been away, I am perſuaded the Attorney General could himſelf moſt ſatisfactorily explain;—and could reconcile his abſence with a ſtrict and honourable obſervance of the duties of his ſtation;—a becoming and merited reſpect for the Court of Exchequer;—and decent reverence of conſideration for a queſtion, deciding on the liberty of one of the Judges of the land; and involving the firſt principles of that free Conſtitution, which his Royal Maſter's coronation oath has pledged him to maintain.

Of all this I am aware; and think it likely that nothing but my own miſapprehenſion could prevent me from perceiving, without the help of explanation, a conſiſtency which may to others be apparent,—between the conduct which in this inſtance he has purſued, and the correct principles, which he is in the habit of acting on.

Meantime while performing a duty, which I owe to the importance of the queſtion, and the dignity of the Court, by (I truſt, not indecorouſly, or offenſively, though with freedom,) animadverting on a ſeeming omiſſion on the part of Mr. Attorney General, it is ſuperfluous to declare,

clare, that as I admire the talents, and profeſſional knowledge of that Gentleman, ſo, in doubting whether on this occaſion, he has been critically correct, I mean no diſparagement of his general character or conduct. Therefore in juſtice to himſelf and me, I confidently expect that he will not be offended.

Nor will I fear that any thing which I may have urged to day, can be miſrepreſented, or remembered to my injury, by others. I ſhall have rouzed no treacherous enemy into action: and even if I ſhould,—yet knowing how free the country is, in which I live, I cannot ſuppoſe that his hoſtile activity would be ſucceſsful. The free doctrines which I have maintained, I ſhould be ſorry to look on as too bold;—and ſtill ſorrier to conſider as in any degree obſolete. Therefore in promulging them, I cannot riſk incurring the diſpleaſure of thoſe conſtitutional Minds, which have the guidance of the State. Nor deſcending from the Government and Magnates, to lower circles, could the oſtenſible enemies of ſlander draw the ſword in ſilence; and, odia in longum jacientes, wait with virulent, relentleſs, and lingering impatience, an opportunity for dark, calumnious, and irreſiſtible revenge.

I know all this. But though the reverſe were true, God forbid that this ſhould deter me from a firm performance of my duty! or that I, emphatically a ſervant of the Conſtitution, ſhould betray

betray my truſt, in order to ſcreen myſelf from danger!

Though, inſtead of living under the free conſtitution of this realm, and the mild adminiſtration of Lord Hardwicke, we were caſt upon worſe governments, and more ſlaviſh times,—yet God forbid that an Interpreter of the law ſhould thereby be induced to treat the preſent like a ſide bar motion! or that applying ordinary means to extraordinary occaſions, he ſhould freeze the energies of his mind in thoſe cold obſervances and common forms, on whoſe fettering power, Oppreſſion too frequently, and too ſucceſsfully relies.

God forbid that in a criſis like the preſent, though Death, or even Diſhonour were to enſue, I ſhould withhold my humble, yet ſtrong (though fallible) opinion, that the conſtruction againſt which I am contending, could not prevail, without endangering the liberties of my country.

I have wandered from my ſubject; but am not aſhamed of the digreſſion.

To return,—I never can aſſent to an hypotheſis, (aſcribed, perhaps falſely, to a law officer of the Crown,) which would caſt an unmerited imputation on our Legiſlature: which might ſeem to bring a charge againſt them, of forging chains for an empire, through mere hurry and inadvertence; and then tardily repairing the miſchief they had done,—when one of the King's

Judges had become the victim of their precipitation.

On the contrary I am bound, by my reverence for Parliament, to reſcue them from charges which are deſtitute of foundation; and of which I ſhall always deny the truth:—ſince if true, they might give birth to a train of zealot rights and duties, ſo fierce and monſtrous, that I, for my part, could not contemplate them without horror.

Nor would any future amendment, ſuch as may have been ſuggeſted, diſparage Parliament, or refute the conſtruction for which I argue. On the contrary, when the Legiſlature makes due proviſion for giving bail, I ſhall ſuppoſe them to intend, for the firſt time, to include bailable offences: and when they ſpecifically include miſdemeanors unattended with eſcape, I ſhall hold it right and conſtitutional ſo to do; and that I have been erroneous in deriving any ill effects from ſuch incluſion.

Or if the future ſtatute were declaratory in its nature, I ſhould offer my arguments, my motives, my reſpect, and my fallibility, as my atonement.

In the mean time, with what ſtrange inconſiſtency might we tax the Legiſlature, in ſuppoſing them regardful of the conſtitutional rights of one ſubject, who was to be put to no greater inconvenience, than that of being brought from one county to the next,—and utterly negligent, at the

the ſame time, of the privileges of another, who after having been conducted as a priſoner, from one end of Ireland to the other, was then to be hurried beyond ſea, to a diſtant country, a ſtrange tribunal, and a foreign code?

But I have heard it ſaid, that bail may be given in England.—That is to ſay, after dragging a petty offender, from the remoteſt corner of this country, acroſs the Channel,—he is there permitted to ſolicit ſtrangers to be reſponſible for *him*, of whoſe character they know nothing.

It was not amongſt ſtrangers,—but in the narrow and familiar circle of his connexions and acquaintance, that the great Alfred, the illuſtrious founder of our law, expected a ſubject to find ſureties for his being amenable to juſtice.

In the comparatively unimportant caſe, of a propoſed removal from one county to another, we find Parliament ſcrupulouſly attentive to the principle of law, that if bail can be had, it ſhall be taken on the *very ſpot* where the arreſt is made; without obliging the accuſed to ſet his foot within a gaol,—or even to go to an adjoining county, in which the offence is alleged to have been committed.

Can we imagine that—in the incomparably more momentous caſe, of a propoſed removal beyond

beyond ſea, from one iſland to another,—the ſame Legiſlature ſhould at once loſe ſight of the privileges of a ſubject, charged with a bailable offence?

Why then, in this latter caſe, does the ſtatute give no authority for taking bail upon the ſpot,—and without removing the party accuſed?

I ſhould anſwer, becauſe in this part of the Act, Parliament had not bailable offences in contemplation;—and therefore ſuch a proviſion would have been ſuperfluous and impertinent.

I am aware how much "abſurdity" has been aſcribed to the opinion, which exempts bailable offences from the operation of this ſection. I know that it has, with reſpectful irony, been propoſed to help the Bœotian intellect of the Iriſh Bench, by a ſubſidiary clauſe, enabling our Judges to underſtand plain Engliſh; and enacting that the *whole* compriſes all the *parts*. I know too that it has been exultingly inquired, how Parliament could have conveyed, more explicitly than has been done, its intention of embracing caſes of miſdemeanor? The pride of this triumphant queſtion, a ſimple anſwer will put down; viz. that by introducing this very word *miſdemeanor*, the Legiſlature would have been more explicit; and have done away all doubt.

Meantime

Meantime agreeably to a conſtruction, by which in defiance of flippant ridicule, I abide, we may obſerve that the preamble to the *firſt* clauſe, which extends to miſdemeanors, adopts an expreſſion, viz. "*offences*," properly enough applicable to inferior tranſgreſſions:—while that of the *third* ſection treats of felons and malefactors; and that of the *fourth* of perſons guilty, not of offences, but of *crimes:* thus ſuggeſting, that Criminal and Malefactor are ſynonymes.

Therefore what is to be done?—For *firſt*, a man arreſted for a bailable offence, muſt not be exiled from his country, and caſt into a foreign priſon; under an Act which does not order a committal without bail;—and in contravention of the letter and ſpirit of the Habeas corpus law; which has been juſtly deemed a modern and ſupplemental Magna Charta.

But *ſecondly*, bail cannot be taken *here*. Therefore the Conſtitution muſt be violated; or the priſoner muſt be diſcharged.

But, ſay the Counſel for the Crown, the proper time for bailing, is when the party ſhall have appeared and pleaded.

Here again the Habeas corpus act is repealed by implication: and this, not by the makers, but by the interpreters of the law. It is repealed, not by the legiſlative, but by the judicial power.

A party

A party arreſted here, ſues out his Habeas corpus.—The return ſhews him to ſtand charged with a merely bailable offence; and the Act, under which the writ was iſſued, directs that bail ſhall be received.—But Counſel for the Crown produce the 44th of the King; and ſay, "you cannot be diſcharged "on bail *here*, where you have been appre- "hended. You muſt go to England *in cloſe* "*cuſtody*; there to appear and plead; and "*poſſibly*, (but very *improbably*,) be bailed."

Let him who can, reconcile this doctrine with what Judge Blackſtone has laid down, 4th Com. 297; that not only to refuſe, but to "DELAY to bail any perſon bailable, is an "offence againſt the liberty of the ſubject;—

"*firſt*, by the common law:—*ſecondly*, by "the ſtatute of Weſtminſter; and *thirdly*, by "the Habeas corpus act."

Again, this being a penal Act, ſhould receive a ſtrict conſtruction: an expoſition in advancement, not reſtraint of the perſonal liberty of the ſubject.

The diſtinction between penal and remedial ſtatutes, is not ſo obvious as might at firſt appear. On the contrary, the ſame Act often partakes of both deſcriptions; and to different parts of it, different rules of conſtruction will apply.

It

It is ſaid that this Act merely renders perſons amenable to juſtice.

But we have ſeen, that the conſtruction which I am reſiſting would do more. It might turn innocence to guilt; and puniſh, by retroſpection, the criminality which it thus created.

Secondly, it may be a hardſhip, to render perſons amenable more than once, for ſubſtantially one offence;—and amenable to the juriſdiction of that particular tribunal, which the proſecutor ſhall vexatiouſly think proper to ſelect.

Thirdly, even ſuppoſing the end to be remedial, yet if the means be penal, which the ſtatute has deviſed for its attainment, the clauſes which enact theſe *means*, ſhould receive a ſtrict conſtruction.

The expence, and irkſomeneſs, and danger, and diſgrace, of a long impriſonment, and ignominious removal to a foreign country,—together with the difficulties, and aggravated coſts attending the party's defence of himſelf there,—are not theſe, I would aſk my Brethren, ſo may penalties?

And if we extend the third and fourth ſections to the caſe of trivial miſdemeanors, may not theſe amercements inflict upon a perſon ultimately acquitted, a more tedious impriſonment, and heavier fine, than could have enſued

ſued upon conviction, if he had been tried at home? ſo as to leave the abſolved wretch nothing better to communicate, to an anxious and afflicted family left behind, than was written by the gallant Francis, after the ruinous defeat at Pavia,—*fors l'honneur, tout eſt perdu.*

Shall we conſtrue theſe clauſes *liberally*, (or perhaps I ſhould ſay *illiberally*,) in order that ſuch effects may be let in? Or can we ſuppoſe that Parliament intended to enact, what appears to have been ſo obviouſly calculated to produce them?

It is true that "ignorantia Juris, *quod* "*quiſque tenetur ſcire*, neminem excuſat."—But the code muſt be jus, *quod teneor ſcire*; or my unwitting tranſgreſſion of it *is* excuſable.

Now, what is the code with which I am bound to be acquainted? That of the country which I inhabit.—I am bound to know, and to obſerve, the laws which afford me protection; and to which, in return for that protection, I owe obedience.

If I viſit Scotland,—while I am a ſojourner there, I ſhall be preſumed to know, and muſt at my peril diſobey, the laws of that country,—to which in my turn I can enforce obedience, from thoſe who would tranſgreſs them, to my injury or diſadvantage.

But

But obſerve the conſequence of maintaining, that by an act done in Ireland, where I am reſident, and from which I do not ſtir, I yet may incur the vengeance of the Scottiſh law.

I write, and ſend ſome letters from Ireland to Scotland; the contents of which are neither libellous nor ſeditious, according to the law, or adjudged caſes in Ireland.—The act which I do, is a publication of thoſe writings: but (as they are not criminal,) it is an innocent act, under the only law, which whilſt I continue in Ireland, I am bound to know.

But ſuppoſe their import to be defamatory and ſeditious, by the Scottiſh law:—a code of which I am ignorant; and which hitherto I have not thought it eſſential to the ſecurity of my life or liberty, to know.

What *then* will follow, from the conſtruction againſt which I am contending? The moment the letters are received in that country, they are *there publiſhed* by my procurement. A Scotch magiſtrate iſſues his warrant; which an Iriſh juſtice complaiſantly endorſes, and executes againſt me. I am hurried over, in unbailable cuſtody, to Scotland: to be certainly convicted by a *majority* of jurors; and to be tranſported for an act, which was an innocent one, by the laws of the country where it was done.

This privilege of being tranſported for a miſdemeanor, formed no item in the liſt of

advantages, which we were promiſed by the Union.

That Conſtitution would hold *wickedly* incongruous doctrines, which ſhould ſay, "you "ſhall be puniſhed for tranſgreſſing a law "which you are not bound to know; and "within the ſheltering influence of which "you do not live."

It would be like holding, that a blind man ſhould not be preſumed to know that he was on the brink of a precipice; but if he fell and periſhed, muſt be conſidered as felo de ſe: or might be compared to refuſing him the benefit of clergy, becauſe he could not read.

Counſel for the Crown indirectly admit the unreaſonableneſs and injuſtice of ſuch a doctrine.

For the argument which they uſe, to reconcile the omiſſion (in the 44th of the King,) to provide for the party's giving bail where he is arreſted,—is the ignorance imputed to the magiſtrates of that diſtrict, of the code which the culprit is charged to have tranſgreſſed.

But why is this ignorance imputed to them?—Becauſe it is not the code under which they live; or conſequently, with which they are bound to be acquainted.—Then whence comes the enlightening beam, which while it is denied to the magiſtrate, illuminates the mind of the ſuppoſed offender?

Shall

Shall ignorance of the law of England, preclude the Iriſh magiſtrate from taking bail, for what ſeems to be no more than a miſdemeanor?—And ſhall not the ſame ignorance protect the Iriſh ſubject—from being committed to cuſtody, and dragged out of his country, on a charge of having broken laws, with which he muſt be preſumed to be equally unacquainted?

To return,—while I remain beyond the Scottiſh territory, I am not *bound* to know its law: and the *preſumption* ſhould be that I am unacquainted with it. Therefore to hold me reſponſible to its proviſions, is to make me a wretched and an abject ſlave: for *miſera eſt ſervitus, ubi jus eſt vagum aut incognitum.*

Neither would the exemptions for which I am contending, expoſe Scotland to being inundated with libels of Iriſh fabric.—For though the *innocent offender* eſcape, the *offence* will not remain unpuniſhed: nor may it perhaps be here immaterial to remark, that the recital contained in the ſtatute, is not that the *offender*, but the *offence* eſcapes unpuniſhed.

He who publiſhes in Scotland, knowingly tranſgreſſes a law, with which he is bound to be acquainted. Therefore, conſiſtently with legal principles, and with moral juſtice, there may be inflicted on *him*, a puniſhment which will vindicate the law,—deter others from a repetition of the like offence,—and prevent

a miſchief,

a miſchief, which by the way is little likely to occur;—and which though it were, it might be better to endure, than deprive millions of the King's ſubjects of their liberties, and Conſtitution.

If the paper which was compoſed in Ireland, were allowable by its laws, who could lament that this innocent and inadvertent tranſgreſſion of a foreign code, ſhould remain unpuniſhed?

If on the other hand, in writing it, the compoſer tranſgreſſed the law of Ireland, he is there anſwerable, as a freeman ſhould be, *juri ſibi cognito*:—and the effect of the conſtruction which I am reſiſting, is not to obviate an impunity which need not occur; but to try and puniſh a man by a law, under which he does not live.

Though theſe iſlands be legiſlatively united, they are juridically diſtinct.

Their ſtatute law differs in many reſpects: ſome diſſimilarity is, for example, to be found in their criminal code; and eſpecially in that branch of it, which relates to miſdemeanors.

But what ſay thoſe, who maintain a conſtruction, different from mine?

They muſt ſay this.

"What we call a libel, you wrote and pub-
"liſhed, (it is true,) in Ireland. But by the
"ſame act, ſome copies found their way into
"England and Scotland. So far as you have

"been

" been concerned, no doubt the publication was
" but a ſingle act. But look at it in this mul-
" tiplying mirror, which we have manufactu-
" red out of the 44th of the King, and you
" will find it reflected into three offences; li-
" able to three puniſhments; and

" Our great revenge has ſtomach for them all.

" Thus you are at leaſt three times as guil-
" ty, as you could have been before the
" Union.

" You cannot indeed, in the caſe of a capi-
" tal felony, have execution three times done
" upon you. But, in miſdemeanor, the courſe
" is clear and eaſy. It is a common ſum in
" arithmetic. Aſcertain what would be an
" adequate puniſhment for your offence, and
" this, multiplied by three, will give the mi-
" nimum of penalty, under our conſtruction
" of the preſent Act.—For example, inſtead of
" two years impriſonment, and a fine of
" 1000*l*, you ſhall be impriſoned for ſix years,
" and pay 3000*l*.; beſides the irkſomeneſs
" and heavy coſts of two long journies, and
" a voyage beyond ſea; together with the
" expences of the two trials de incremento,
" which the Union, and 44th of the King,
" will have ſecured you.

" It is true that this conſtruction not only
" repeals the maxim, that pro eâdem cauſâ
" nemo debet bis vexari,—but may operate
" to puniſh *miſdemeanors*, (even where they do

" not

"not amount to a breach of the peace,) by "impriſonment for life; and confiſcation of "all property, real and perſonal, of the offen- "der. Nay he may be utterly ruined by an "acquittal. But will not this tend to prevent "others from offending in the like manner?"

This preventive end is certainly a good one. I ſhould only doubt whether it might not be too dearly purchaſed, by a ſurrender of the moſt valuable birthrights of the ſubject.

Far from denying the efficacy of this multiplying mirror, I ſhould rather tremble at its power. I ſhould fear that it might operate like thoſe of Archimedes; by quickly and utterly conſuming our liberties, and Conſtitution.

Why drag the Iriſhman, who had never quitted Ireland, to London, for an offence alleged to have been committed by him, conſtructively preſent there?

Forſooth, becauſe Ireland is a part of the United Kingdom.

Why try him afterwards in Ireland, and a third time in Scotland, for the ſame prolific act? feaſting each time on his anguiſh,—and ſneering at his vain plea of *auterfois acquit?*

Becauſe, for the purpoſe of oppreſſing the ſubject, Ireland has again recovered her diſtinctneſs.

The Legiſlature can never have intended this: and we libel Parliament, by giving their ſtatute ſo vexatious a conſtruction.

We

We will (ſay ſuch expounders,) conſider the iſlands as united, for the purpoſe of trying you where we pleaſe;—and we will conſider them as ſeparate, in order to puniſh you as often, and as exorbitantly as we pleaſe.

But to return, at all riſks, into Scotland.

An Iriſhman there, writes to inform a friend here, of a groſs inſult and injury which he has received;—and inquires what he ought to do in conſequence.

The other, leſs conſulting prudence or morality, than paſſion, falſe punctilio, and friendly zeal, adviſes to call to the houſe of the affronter;—to expoſtulate, and demand an apology for the inſult; and proceed to inflict perſonal chaſtiſement, if refuſed.

This is done accordingly;—and the Iriſhman, apprehended under the endorſed warrant of a Scottiſh magiſtrate, is hurried thither, and there is at leaſt in ſome danger of being hanged, for the commiſſion of an acceſſorial crime, capital by the laws of that country; where he never ſet his foot, until he went thither to ſuffer death; for breaking laws which he neither lived under nor knew; and this by an act, not puniſhable (or at leaſt—not ſo heavily penal,) in his own country.

Perhaps I have not ſtated accurately the effect of Scottiſh law;—of which (God avert the conſequences!) I am ignorant enough.

Therefore of the argument which I have juſt

juſt been uſing, I cannot eſtimate the force. In fact, in dwelling upon weightier reaſons, I have not diſdained the tranſient aid of thoſe of inferior ſtrength. When the liberties of my country ſeemed ſinking in the abyſs, to prevent their ſubmerſion, I perhaps might catch at ſtraws. But I truſt I have been able to lay hold on more ſolid materials for reliance: and though from a miſconception of their ſtatute, the wiſe intentions of the Legiſlature were fruſtrated and overwhelmed,—and the Conſtitution of Ireland were to founder with them,—that I have clung to a plank, on which my honour may be ſaved.

Do I uſe the language of an advocate?—I truſt I do.—But I am concerned for no Individual. I am an advocate, exerting myſelf on behalf of the Conſtitution. Such advocatiſm is more than the privilege,—it is the duty of a Judge:—and the quiddam honorarium which I require,—is to have it remembered, that at all riſks, I ever ſhall defend it.

If on the preſent occaſion I ſupport it with becoming warmth—it may be, that I yet retain the excitation of a ſpeech, which did honour even to the eloquence of Mr. Curran; and gave additional luſtre to the importance, however tranſcendent, of the preſent ſubject: a ſpeech, which thoſe would be worſe than bad critics, who could miſtake for merely brilliant declamation.

But

But to return to dryer topics.

I cannot conſent ſo to conſtrue a ſtatute, as that it ſhall impliedly, and by conſtruction, accompliſh that, which perhaps the Legiſlature might heſitate to do expreſsly; viz. not to ſuſpend for a time, and in the caſe of offences preſently dangerous to the State,—but *generally*, and *for ever*, to repeal the proviſions of the Habeas Corpus Law.

We are in the habit of leaning ſtrongly againſt the doctrine of conſtructive repeals.—Shall we admit, as an exception to this rule, the propriety of overturning by a ſide wind, the proviſions of the Habeas Corpus Act? and diſplacing, by conſtruction, the corner ſtone of our Conſtitution?

The moſt eſſential proviſo of that ſtatute is abrogated here, if the exception of treaſon and felony, which it contains, be extended to miſdemeanors of the moſt trifling nature;—and the venial offender, though he offer bail, be committed to cloſe cuſtody, and tranſported beyond ſea. I ſay, though he tender bail:—becauſe, for want of an authority given by the preſent Act, ſuch bail, if tendered, could not be received.

Therefore, as the Legiſlature has not provided that bail ſhall be taken from the perſon arreſted, at the place of his apprehenſion, it did not mean to extend this Act to the caſe of bailable offences; and eſpecially not to thoſe

unattended with eſcape:—or ſecondly, though we ſhould ſurmiſe the Legiſlature to have ſo intended,—we muſt wait for *direct* words, before we can effectuate this intention. In the mean time we are not warranted to repeal any law,—and leaſt of all, the Habeas Corpus Act and Magna Charta,—by implication.

But it is ſaid that under this Act, the offender may give bail in England.

I repeat *firſt*, that this would not be enough. For, to *delay* receiving bail,—to ſend the accuſed a cloſe priſoner beyond ſea, to find it amongſt ſtrangers,—would be to repeal pro tanto the common law,—the ſtatute of Weſtminſter,—and the Habeas Corpus Act.

Secondly, perhaps non conſtat that bail could be received in England: although *I* may be of opinion that it could. At all events, (and which is the only material inquiry,) the words relied on, as enabling the Engliſh magiſtrate to take bail, do not manifeſt a legiſlative intention to include miſdemeanors.

For inſtance;—if the Engliſh magiſtrate had been directed by this ſtatute, to deal with the Priſoner (when tranſmitted,) *according to law*: would it, from ſuch words, be *clear* that the Legiſlature meant to include bailable offences? It certainly would not: and I apprehend that the words made uſe of, are merely equivalent to thoſe which I have ſuppoſed.

Parliament may have meant no more than to

to prohibit a diſcharge.—If the words had been, that the magiſtrate ſhould *proceed with the Priſoner according to law*, he might have been induced to aſk himſelf this queſtion:—"according to what law is it, that I ſhould "proceed? If according to the law, as it ſtood "before the paſſing of this Act, I muſt diſ-"charge the Priſoner: for until this ſtatute, I "had no authority to detain him. If I am to "deal with him according to the law created "by the preſent Act, then I do not find it "ſpecify what that law is."

Therefore the Legiſlature, expreſſing itſelf more preciſely, ſaid that the magiſtrate, on receiving the tranſmitted priſoner, ſhould "*pro-*"*ceed with him, as if he had been legally appre-*"*hended in England.*"

I am not however called upon to prove, that theſe words might not give authority to bail, if the Legiſlature meant to comprehend bailable offences. It is enough for me, to ſhew that ſuch expreſſions do not imply an intention to include them; nor rebut the preſumption, which totâ lege inſpectâ will ariſe, that the ſtatute was not meant to extend to miſdemeanors. For though we reſtrict the operation of the law to felonies, the language adopted will be preferable to the words "*ac-*"*cording to law*," (which I have ſuppoſed;) as more free from doubt, and more preciſely definitive,

finitive, of the authority which the magiſtrate is permitted to exert.

But why ſhould we, contra-libertatem, ſtrain thoſe expreſſions into evidence of an intention to include miſdemeanors, and reject another inference, more deducible from them, and which would at leaſt exclude ſuch as were not accompanied by a real or *quaſi* eſcape?—I have already in a former part of my argument obſerved, that the words "*as if the perſon had been legally apprehended in England,*" ſeem nearly tantamount to theſe,—*as if he had not withdrawn himſelf from thence.*

Again, how do the words relied on empower, (if they do ſo) the Engliſh magiſtrate to take bail? No otherwiſe than by reference to, and recognition of the law of England,—that for a miſdemeanor, bail ſhall be taken, where the accuſed is apprehended.—But is not this the law of Ireland alſo?—And if it be, how can we ſend Judge Johnſon a cloſe priſoner to England, under a charge of miſdemeanor,—and by virtue of an Act, which does not expreſsly prohibit the admitting him to bail? It is true he cannot be bailed here. But does it follow that he ſhould be tranſmitted? or may it not rather follow that he ought to be enlarged?

To reſume: the Iriſh Habeas Corpus Act is nearly copied from the Engliſh. One clauſe in the latter, does not however, (nor its parallel) occur in ours. That clauſe makes it highly penal

penal to remove a priſoner from England, to Scotland, Ireland, Jerſey, Guernſey, Tangier, or any other places beyond the ſeas. The cauſe of this omiſſion it may not be eaſy to aſcertain. Perhaps a confidence in the Government, founded on the conſtitutional conduct of his preſent Majeſty's illuſtrious houſe. Perhaps that the foreign parts which I have mentioned, were dependencies, not of this country, but of England. But let the cauſe of the omiſſion have been what it may, can we doubt that the ſpirit of the omitted clauſe ſhould be conſidered as pervading the Iriſh ſtatute?

What then does this ſection of the Engliſh act denote? A conſtitutional jealouſy, entertained by the Legiſlature, (or rather by the Commons,) and which ſeems particularly pointed againſt a practice of conveying perſons beyond ſea,—which had obtained, in the times immediately preceding this important Act.

This clauſe is the more remarkable, becauſe it follows one, which provides that the Habeas Corpus ſhall run *into thoſe very iſlands* of Jerſey and Guernſey, to which, (ſo averſe were the framers to trips beyond the ſea,) it is, notwithſtanding, forbidden to ſend any Engliſhman a priſoner.

The title of the Act alſo ſhews the ſame jealouſy; which it now ſeems ſo much the faſhion to lay aſide.

It is entitled "An Act for better ſecuring the

"liberty

"liberty of the Subject; and for *prevention of* "*imprisonments beyond Sea.*"

I may here briefly observe, that in the course of the present discussion, three statutes have been repeatedly referred to; viz. the 13th of the King, ch. 31; the 23d of George II. ch. 26; and 24th of the same reign, ch. 55.

As to these Acts, I admit *with* the Counsel for the Crown,—and I *rely on it* against them,—that they were the rudiments of the present statute.

I am also ready to admit, what they farther have insisted, that those Acts establish, between the districts of England and Scotland, and counties of Great Britain, the same law, which the present statute has created for the interior of Ireland; and between the British islands.

But if the combined preambles of the 23d and 24th of George II. be held to differ from the general preamble of the 44th of the King, (which I hold, and have already shewn that they do not;) then the same law is *not* adopted between the counties of Ireland, by the latter Act, as was established between those of Great Britain, by the two preceding.

For *there*, clearly there must have been an escape, or migration, after offence: though whether before or after warrant, became (by the 24th of George II.) immaterial.

I say there must have been a removal. For the enacting words of the 24th of George II. are not *enlarging*. They do not apply generally to

"*any*

" *any perſon* ;" but only to one, *againſt whom* " *a warrant ſhall be iſſued.*" Thus theſe latter reſtrictive words connect the enactments with the preamble; and link both to the ſtatute of the antecedent year.

Now no reaſon can be aſſigned for ſuch a difference of law, as ſhould diſpenſe with the neceſſity of eſcape between the Iriſh counties; but ſhould hold it indiſpenſable as between the ſhires of the neighbouring iſland.

We therefore ought to reject a conſtruction of the 44th of the preſent King, which introduces ſo unaccountable, and irrational a diſtinction.

But with what force, (I would aſk,) do the Counſel for the Crown cite the Acts which I have noticed, by way of refuting my expoſition of the one before us?

For no adjudication on the conſtruction of thoſe ſtatutes has been quoted: and until the contrary be ſhewn, I may aſſume that they have not been ſo interpreted, as by analogy to extend the preſent Act to Mr. Juſtice Johnſon. For until it be demonſtrated, I will not preſume that any Act has been ſo conſtrued, as (according to my ideas,) to infringe the Conſtitution.

And as to the 13th of the King, which I admit to be the immediate parent of the Act in queſtion, how does Blackſtone, (remarkable for the accuracy of his deſcriptions,) delineate its effects, in 4th Com. 292?

" And now" (ſays he) " by the ſtatute of the

" 13th

" 13th George III. ch. 31. any warrant for ap-
" prehending an Engliſh offender, who may have
" ESCAPED into Scotland, or vice verſâ, may be
" endorſed and executed by the local magiſtrates;
" and the offender conveyed BACK," (obſerve the expreſſion,) " to that part of the United
" Kingdoms, in which ſuch offence was com-
" mitted."

Can a man have *eſcaped* to a place, in which he has remained from his birth?—or be conveyed *back* to a country, in which he never was before?

Thus Blackſtone's interpretation of the 13th of the King ſuſtains my doctrine, that the 44th applies only to migrations. For the Counſel for the Crown aſſert that this is the legitimate offſpring of the former; and vehemently inſiſt on its cloſe reſemblance to the parent ſtatute.

To return: the enactments of the third and fourth ſection are the ſame; except that the former relates to eſcapes into Ireland, from Great Britain; and the latter to elopements vice verſâ.

Therefore we cannot conſtrue the fourth clauſe to authorize the removal to England, of a perſon arreſted here, under the warrant of a Britiſh magiſtrate, for a miſdemeanor,—without at the ſame time holding that the third ſection will juſtify the like removal, of one ſimilarly circumſtanced—to Ireland.

Will the Judges of England be ever induced to concur in this conſtruction?

I paſs

I paſs over the ſlighter conſequences of ſuch an expoſition: for inſtance, the exile of their greateſt men, under the fiat of an Iriſh trading juſtice, endorſed by an Engliſh magiſtrate of the like reſpectable deſcription: the removal of their Speaker from the Chair,—or their Chancellor from the Woolſack,—to anſwer for having by letter animadverted with too much freedom, on the conduct of ſome not humble, though obſcure retainer, of the Iriſh Government.

I advert to no ſuch comparatively inſignificant effects as theſe:—but to that direct repeal of the Engliſh Habeas Corpus Act, which ſuch a conſtruction of this third ſection muſt involve.

Will the Engliſh Judges ſo expound the ſtatute now under conſideration, as that an inhabitant of England, who is no convicted felon, and has not been charged with any capital offence, ſhall yet be ſent a priſoner to Ireland? What would thoſe Judges think of the promptitude of an officer, who conceived it his duty to refuſe the priſoner time to obtain his Habeas Corpus? or in what light would they view the apprehenſions of a Crown lawyer, that ſuch delay, though conceded to the requeſt of the man in cuſtody, might expoſe the conſtable and his aſſiſtants to an action of falſe impriſonment?

That the Act under conſideration, according to the conſtruction which I reject, operates on individuals, with a rigour diſproportionate to their alleged offences, is but an inferior reaſon againſt

interpreting it ſo. A more ſolid and formidable objection is, that ſo conſtrued, it might be wielded as an inſtrument of oppreſſion.

We may exult that George the Third is on the throne; and that his gracious diſpoſitions are repreſented by Lord Hardwicke: but we are bound to maintain the checks of our well guarded Conſtitution, againſt evil times, and arbitrary rulers.

We therefore are not to overlook what appears upon the record: namely, that the preſent is a ſort of State proſecution; for an alleged libel on the executive Government of this country.

We are not to forget, that what is contended for by the ſervants of the Crown is, that the Habeas Corpus Act ſhall be ineffectual to procure the enlargement of one, who has incurred their diſpleaſure, by the ſuppoſed commiſſion of one of the loweſt bailable offences:—by the publication of what, (having no judicial knowledge of its contents,) we want the means of pronouncing to be untrue.

We, the legitimate expounders of the lex terræ, and eſpecially called on to give efficacy to thoſe laws, which form an entrenchment round the liberties of our country,—are bound to aſk ourſelves, what motive the ſervants of the Crown might in arbitrary periods have, for ignominiouſly ſending as a priſoner, to another country, a man placed in one of the moſt dignified

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ſituations amongſt the magiſtracy,—whilſt as yet his innocence of any crime muſt be preſumed; and when the ſuffering him to remain at home, ſo far from producing a failure of juſtice, would ſubject him to the juriſdictions of the country, where his offence, if any, was committed:—where the merits of his caſe could be moſt fairly tried:—where his defence could be moſt advantageouſly made;—and his innocence, if he were innocent, moſt eaſily made appear:—where amongſt friends he could find ſecurity, to exempt him from a priſon:—where, if acquitted he would be unpuniſhed;—and if convicted, his puniſhment would be proportionate to his offence.

The anſwer to theſe queſtions, as to the probable motives of a Government, in times unlike the preſent, might guide to a determination of the matter now before us.

Though the topic be a delicate one, I alſo feel it to be a duty, (to which all conſiderations of mere delicacy ſhould give way,) to obſerve that the priſoner is one of the Judges of the land.

With what view do I make this obſervation? Shall the Judges be leſs reſponſible to juſtice for their conduct, than the obſcureſt individual of the country?—God forbid!—I am rather diſpoſed to maintain the oppoſite opinion. But it is to be recollected, that in our frame of Government, the Judicial Order forms a diſtinct, and ſort of *barrier* eſtate: and that it is a principle of the firſt importance to our freedom, that this body ſhould

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be protected from all oppreſſive controul, and jealouſly removed from all ſeductive influence, which the Executive might be tempted to exert.

The Judges ſtand, (at leaſt they may ſtand,) in the breach; and ought manfully to maintain their privileges and independence: leſs for their own ſake, than for that of the Conſtitution. Nor has any thing happened lately in this country, which ſeems calculated to warrant their ſlumbering on their poſts. Therefore, in the moment in which we find a Judge the object of this proceeding, it illuſtrates the abuſes to which, ill conſtrued, the ſtatute, at ſome future period, might give riſe.

We ſhould remember that it is of emphatic conſequence to the public, that the independence of the Bench ſhould exiſt, not merely in theory, but ſubſtantially in practice; and that the Habeas Corpus Act, (which Counſel for the Crown by a ſide wind would overturn,) is a barrier erected by the patriotiſm of our anceſtors, againſt the encroachments of the Crown: encroachments as likely to be made, if at all attempted, upon the Judges of the land, (thoſe impediments to deſpotic rule,) as upon any other Order in the State.

On the whole, I conſider this, as perhaps the moſt vital queſtion which I have been ever called on to diſcuſs. A more important one, than I ever expected to find ſubmitted to me: a more critical

critical one, than, I hope, I ſhall ever have to inveſtigate again.

If the Judges reject my conſtruction of this Act, I ſhall bow to their interpretation, as the true one:—and my deference for Parliament will prevent me from pronouncing, that ſo expounded, the ſtatute is oppreſſive.

But, while the queſtion is yet open, I may avow my opinion, that the proviſions, which a conſtruction different from mine muſt introduce, would tend to ſhake our liberties and Conſtitution to their foundations.

I admit that they might equally affect the liberties of England. But the proud and enlightened Magiſtrates of that country will, I am perſuaded, aſſert theirs with ſufficient boldneſs.

I for my part confeſs, that my firſt anxiety is for the honour, the freedom, and the welfare of my native land.

Indeed the ſilence with which the event of this arreſt has been received, might lead one to infer that I have been exaggerating its importance; and that the tranſaction is leſs momentous, than I conceive, or repreſent it.

But the teſt afforded by ſuch ſilence might, in times leſs fortunate than ours, become highly dangerous and fallacious: and therefore it is unſafe to reſort to it at all.

We cannot have forgotten how profound the ſilence was, which the Moniteur obſerved on a far different occaſion: diſſimilar to what, while our laws

laws are rightly conſtrued, can ever diſgrace or terrify this country.

I mean the apprehenſion of the late Duke d'Enghien: when he was hurried from a foreign territory into that of France, by the perſons exerciſing the powers of Government there,—to be tried by a law with which he was unacquainted, for a crime alleged to have been committed in a country where he had not been.

The ſilence *there* may have originated in terror or corruption. But I have already proteſted againſt the ſophiſtry of deriving concluſions from the virtues of our Sovereign, the merits of the Viceroy, or circumſtances of the day.

We therefore ſhould, on the contrary remember, that in this country like cauſes may produce the like effects; as our hiſtory ſhews them to have done in evil days; which might recur.

If this were ever hereafter to be the caſe, would not ſuch frightful ſtillneſs ſupply an argument, more impreſſive and eloquent than words could frame, to prove how alarmingly conſtitutional an occurrence muſt be, of which the Preſs did not venture to take notice.

I know that ſome will be, or affect to be, ſurpriſed by the tone which I have thought it proper to aſſume. There may indeed be a tame, and creeping, and tradesman-like mode of adminiſtering the law conceived: but it is not one which meets my ideas of the duty or ſtation of a Judge. Laws are but means: and though it be

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not our province to legiſlate, but to interpret,—yet ſhould we not forget, or fail to further, the end and object of thoſe laws, which we are called upon to conſtrue: namely the preſervation of public morals; the promotion of ſocial order; and the eſtabliſhment of good Government, of our liberties, and of the Conſtitution. Nor would it be poſſible that any laws, whoſe direct and obvious tendency was to overwhelm this latter, could flow from the only ſource, which ſhould give them force and authenticity; viz. from the true principles and ſpirit of the Conſtitution.

Therefore I repeat, that where the words of a ſtatute are ambiguous, I ſhall always hold that ſo to conſtrue them as to work oppreſſion, is to interpret them falſely.

Beſides, the ſtatute which we are expounding, may be conſidered as in ſome degree conſequential to the Union: a meaſure which, (let me without egotiſm be permitted to recollect, that) while a member of the Legiſlature, I ſupported.

If that arrangement, now the law of the land, and as ſuch entitled to our (and eſpecially to my) reſpect, ſhould, as may happen to the beſt meaſures, be abuſed,—ſtill, ſo long as I was not an accomplice in them, I ſhould not hold myſelf reſponſible for thoſe abuſes; nor culpable for having unwittingly contributed to produce them, by being party to a league, from which they need not have ariſen.

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But the United Parliament never will enact what, rightly conſtrued, can be ſubverſive of Iriſh freedom. How therefore can abuſes in the ſtatute law ſpring up, unleſs through miſinterpretations, proceeding from the Bench? Or how could I pretend to an unblemiſhed character or tranquil mind, if I were adviſedly to lend my hand to a perverſion of that compact, which I fondly conſidered as enſuring the happineſs of Ireland,—and in the formation of which, I therefore actively concurred? How indeed could I look for pardon from my God, if by (what ſtrikes me as) the forced conſtruction of a corollary ſtatute, I ſhould effect the degradation and enſlavement of my country?

No. Let us leave the Habeas Corpus Act untouched: the Union on the liberal baſis, on which, when carried, it was placed: the Conſtitution in the ſtate, in which our brave Anceſtors bequeathed it. We are not likely to render our liberties more ſecure, by alteration. To the raſh Innovator who attempted it, I ſhould be diſpoſed to exclaim, in the ominous and emphatic language of the Roman Centurion, "*ſignifer ſtatue "ſignum:* HIC MANEBIMUS OPTIME."

Theſe were the obſervations which I had to make. In entering ſo far upon the ſubject to which they apply, I may have wearied my hearers:—but I have ſatisfied my conſcience.

FINIS.